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REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

BY

J. P. DE GEX, H. CADMAN JONES, AND R. HORTON SMITH, Esqs.,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

REEVE v. WHITMORE.

MARTIN v. WHITMORE.

1863. November 5. Before the Lord Chancellor Lord WESTBURY.

An assignment of existing chattels by way of mortgage, accompanied by a power to the mortgagee to put a manager in possession, and a license to the mortgagee to enter and seize after acquired chattels, does not operate as an equitable assignment of such after acquired chattels, or create in the mortgagee any present equitable interest in them.¹

What amounts to notice on the part of a mortgagor of a sub-mortgage created by his mortgagee.

Where under a license to seize after acquired chattels seizures have been made, but the Court of Chancery intervenes before any conversion of the property seized has been made, *semble*, that the rights of the various incumbrancers must be determined by a reference to what might have been done by any of them under the powers given by their respective securities.

¹ See *Henshaw v. Bank of Bellows Falls*, 10 Gray, 571, 572; *Jones v. Richardson*, 10 Met. 481; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 Cush. 306; *Petch v. Tutin*, 15 M. & W. 110; *Carr v. Allott*, 27 L. J. Exch. 385; S. C., 3 H. & N. 964; *Head v. Goodwin*, 37 Maine, 182; *Winslow v. Merchants Ins. Co.*, 4 Met. 306; *Chidell v. Galsworthy*, 6 C. B. (N. S.) 471; *Moody v. Wright*, 13 Met. 30, 31; *Mitchell v. Winslow*, 2 Story, 630; *Gardner v. McEwen*, 19 N. Y. 123; *Chapin v. Cram*, 40 Maine, 561; *Hunt v. Bullock*, 23 Ill. 320; *Cudworth v. Scott*, 41 N. H. 476; *Walker v. Vaughn*, 33 Conn. 577; *Rowan v. Sharp*, 29 Conn. 282; *Oliver v. Eaton*, 7 Mich. 108; *Rose v. Bevan*, 10 Md. 466; *Smithurst v. Edmunds*, 1 McCarter, 408; *Farmers' Loan, &c., Co. v. Commercial Bank*, 11 Wis. 207; *Chapman v. Weimer*, 4 Ohio (N. S.), 481.

THIS was an appeal by the plaintiffs in the suit of *Martin v. Whitmore* from a decretal order made by the Vice-Chancellor KINDERSLEY upon the hearing of both the above suits, so far as by such order (after a preface that it appeared that no notice was given by the appellants to one William David Simpson of a certain deposit of deeds and memorandum of the 13th of June, 1859, until after the bankruptcy of one Daniel Green) it was declared

* 2 that an indenture of the 26th of May, 1859, * as deposites of which the appellants claimed, did not operate or take effect as an equitable assignment of any clay, bricks, machinery, plant, stock, goods, chattels, effects, or property which were not in, upon, or about the brick-field and premises at Crayford, mentioned in the indenture in question at the time of the date and execution thereof; and so far as it was declared that the security held by the appellants under and by virtue of the aforesaid deposit and memorandum of the 13th of June, 1859, was subject and liable to all the equities which existed between William David Simpson and Daniel Green in relation to the indenture of the 26th of May, 1859, and the security thereby made or created at the date of the bankruptcy of Daniel Green; and that the appellants could claim the benefit of such deposit and memorandum to the extent only of what remained due under the said indenture from William David Simpson to Daniel Green, subject to the results of the second inquiry therein after directed; and so far as inquiries were directed founded on or consequential upon the said declarations; and so far as directions were given that in taking the account No. 15 in the decree, regard was to be had to a memorandum signed by Daniel Green of even date with the indenture of the 26th of May, 1859, and to the dealings between Daniel Green and William David Simpson subsequent to the date of the said indenture.

The facts of the case were shortly as follows:—

William David Simpson was a brick-maker carrying on business in a leasehold brick-field at Crayford, in Kent, and as such was possessed of certain stock in trade, and machinery and effects in and about the premises, and used by him in his business.

* 3 On the 12th of January, 1858, and by an indenture * of that date, William David Simpson covenanted with one Thomas Hendrick to invest in their joint names, or in the name of the survivor of them, a certain trust sum of 1300*l.* stock; and also, in the event of non-investment of the aforesaid sum by a given day, to pay

interest on a sum of 1160*l.* sterling from the day of the execution of the indenture in statement until a certain named day. And by the indenture now in statement for further securing the performance of the agreement therein before mentioned, William David Simpson assigned to the defendant Thomas Hendrick, his executors, administrators, and assigns, all and singular the stock of bricks then being, or at any time thereafter to be, in or upon the said brick-field, together with the steam-engine and machinery therein, and all other the plant, trucks, waggons, barrows, iron tramways, pumps, stock, and property in and upon the said field, and generally used therein by the said William David Simpson in his said business, and also all the horses, carts, and ropes therein; all which said live and dead stock, goods, chattels, effects, and property were then in the use and enjoyment of the said William David Simpson, and were for the most part mentioned and set forth in the schedule thereunder written, subject to a condition for avoiding the indenture now in statement upon the investment being made. The indenture contained a power to Thomas Hendrick, his executors, administrators, and assigns, in case default should be made in the making of such investment on a given day, or in case of the decease of William David Simpson, or in case of any distraint for rent due from him to the landlord of the brick-field being made thereon, and notwithstanding that no interest should be then due or payable by virtue of the security now in statement, immediately, or at any time or times thereafter, to sell and dispose of the said steam-engine, live and dead stock, and other effects therein before assigned, and to receive the moneys * to arise * 4 from such sale, and thereout to retain and reimburse himself and themselves all costs, charges, and expenses attending such sale, and to retain such a sum of money as might be required to purchase, at the then market-price, the said sum of 1300*l.* stock, including the brokerage attending such purchase, and to pay over the surplus of such moneys to William David Simpson, his executors, administrators, or assigns; and William David Simpson covenanted with the defendant Thomas Hendrick (amongst other things), that it should be lawful for Thomas Hendrick, his executors, administrators, or assigns, or his or their agents or servants, forthwith to enter into and upon the brick-field, and therein to remain, and to have and hold possession of all the said goods, chattels, effects, and property thereby intended to be assigned until the investment of

the stock, and until all expenses as aforesaid should be paid, or until the defendant Thomas Hendrick should put in force the power of sale therein before contained.

Default was made by William David Simpson in causing the sum of stock to be invested, but Thomas Hendrick never exercised the power of sale contained in the lastly stated indenture, or took possession of any part of the goods, chattels, effects, or property thereby expressed to be assigned.

On the 26th of May, 1859, an indenture of that date was executed by all the parties thereto, and it was upon the terms of this indenture that the argument mainly turned. The indenture in question was made between William David Simpson of the first part, Thomas Hendrick of the second part, and Daniel Green of the third part. It recited the lastly herein before stated indenture, that default had

been made by William David Simpson in purchasing the said
* 5 sum of 1300*l.* stock, * that William David Simpson then was

(subject as aforesaid) possessed of the plant, machinery, live and dead stock then in, upon, or about the brick-field, and the particulars whereof were for the most part mentioned and set forth in the schedule thereunder written, and also of a large quantity of clay manufactured and ready to be formed into bricks, and which manufactured clay was also then upon the brick-field; that there were then large sums of money due from William David Simpson in respect of arrears of rent of the brick-field, and that William David Simpson had then pressing occasion for the sum of 3000*l.* in order to enable him to continue to work the brick-field, and unless the said sum of 3000*l.* was obtained by him forthwith he would be unable to continue the working of the brick-field, and the same must remain unworked; that Thomas Hendrick was unable to lend him any further moneys, and that William David Simpson had applied to Daniel Green to advance the said sum of 3000*l.*, which the said Daniel Green had agreed to do on having the repayment thereof secured to him by the indenture now in statement, and on having the security to him thereby intended to be made placed in priority to the therein before recited security to Thomas Hendrick of the 12th of January, 1858.

It further recited that, in order that the security of the 12th of January, 1858, might produce any benefit whatever to Thomas Hendrick, it was absolutely necessary that the brick-field should continue to be worked, and that Thomas Hendrick had therefore agreed to

join in the indenture now in statement for the purpose of postponing his security of the 12th of January, 1858, to the indenture now in statement, which Thomas Hendrick had consented to do upon Daniel Green entering into a certain covenant with Thomas Hendrick for payment in * the manner contained in an inden- * 6 ture between the two of even date.

It further recited that it had been agreed that a person to be appointed by Daniel Green, his executors, administrators, or assigns (if and when he or they should so think fit) might at any time thereafter during the continuance of the security now in statement be put into possession of the said machinery, live and dead stock, goods, chattels, brick-earth, effects, and property; and that he or his substitute should continue in such possession during the existence of the security now in statement; but that, subject to such right of possession, William David Simpson might have the use and enjoyment of the said machinery, live and dead stock, goods, chattels, effects, and property as and in manner therein after provided.

It further recited that Daniel Green had, previously to the execution of the indenture now in statement, and in part performance thereof, advanced to William David Simpson certain sums of money, amounting in the whole to 1200*l.*, part of the said sum of 3000*l.* so agreed to be advanced; and had also that day advanced and paid to William David Simpson the sum of 1800*l.*, residue of the said sum of 3000*l.*, as William David Simpson thereby acknowledged.

The indenture now in statement then witnessed, that, in pursuance of the said agreement, and in consideration of 1200*l.* so theretofore advanced and paid by Daniel Green to William David Simpson, and also of 1800*l.* to the former then paid by the latter, William David Simpson granted, assigned, and transferred unto Daniel Green, his executors, administrators, and assigns, “all and singular the prepared clay and earth ready for the * manu- * 7 facture of bricks and stock of bricks in and upon the said brick-field of him the said William David Simpson at Crayford aforesaid, together with the steam-engine and machinery thereon, and all other the plant, trucks, waggons, barrows, iron tramways, pumps, stock, and property in and upon the said field, and generally used thereon by the said William David Simpson in his said business; and also all the horses, carts, and ropes therein: all which said live and dead

stock, goods, chattels, effects, and property are now in the use and enjoyment of the said William David Simpson, and are for the most part mentioned in the schedule hereunder written; and all the right, title, and interest of him the said William David Simpson of, in, and to the said manufactured clay, machinery, plant, live and dead stock, goods, chattels, effects, and property, and every part and parcel thereof:" to hold the same unto Daniel Green, his executors, administrators, and assigns, as his and their own proper goods, chattels, and effects, subject to a *proviso* for the avoidance of the security now in statement upon payment by William David Simpson, his heirs, executors, administrators, or assigns, to Daniel Green, his executors, administrators, or assigns, of the aforesaid principal sum of 3000*l.* with interest.

The indenture now in statement then contained a power for William David Simpson to have the use and enjoyment of the said manufactured clay, and the bricks to be manufactured therefrom, machinery, plant, live and dead stock, goods, chattels, effects, and property thereby assigned, as well until default should be made in payment of the 3000*l.* and the interest thereon as after such default, until the expiration of one day after such time as Daniel Green, his executors, administrators, or assigns, should, by a notice in writing to William David Simpson, his executors * 8 or administrators, require the exclusive * possession of the said manufactured clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects, and property to be given up to him, Daniel Green, his executors, administrators, or assigns; and it was agreed that immediately upon the expiration of the said notice William David Simpson, his executors, administrators, or assigns, should deliver up the same accordingly.

Next followed covenants by William David Simpson with Daniel Green for payment of the principal sum of 3000*l.* and interest; and then came an agreement between the parties thereto, that in case default should be made in payment of the principal sum of 3000*l.*, or the interest thereof, or any part thereof respectively, and such notice as aforesaid, having been given or left as therein aforesaid, should have expired, it should be lawful for Daniel Green, his executors, administrators, or assigns, at any time or times thereafter, peaceably and quietly to receive and take into his and their absolute possession, and thenceforth hold and enjoy all and every the said clay, bricks, machinery, plant, live and dead stock,

goods, chattels, effects, and property thereby assigned, and also to sell and dispose of the same and every part thereof, and to receive the moneys to arise by such sale thereof, and therewith to reimburse himself and themselves all costs, charges, and expenses which he or they might incur or be put to in and about the keeping possession of the said clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects, and property, and making any sale or sales thereof, and in and about the recovery of the said sum of 3000*l.* and interest respectively; and in the next place to retain to himself and themselves the said sum of 3000*l.* and the interest thereof, or so much and such part thereof respectively as should remain unpaid, and to account for the surplus (if any) of the * money arising from such sale as aforesaid to the said * 9 Thomas Hendrick, his executors, administrators, or assigns.

Then, after the usual receipt clause in favour of Daniel Green, Thomas Hendrick covenanted with Daniel Green that the principal moneys, interests, and costs, charges, and expenses thereby secured should be and be taken and considered as charged and secured on the said clay, bricks, machinery, plant, live and dead stock, property, and effects in preference and priority to the moneys secured by the therein before recited indenture of the 12th of January, 1858, and to the charge and security thereby made; and that the several trusts, powers, and provisos in the indenture now in statement expressed and contained should be exercised and carried into execution in preference and priority to the several trusts, powers, and provisions in the said last-mentioned indenture expressed and contained: to the intent and purpose that the principal interest, and other moneys secured by the indenture of the 12th of January, 1858, and the charge and security for the same, might be postponed to the charge and security by the indenture now in statement made to all intents and purposes whatsoever, as if the indenture now in statement had been made and executed previously to the indenture of the 12th of January, 1858; and further, that Thomas Hendrick, at the time of sealing and delivering the indenture now in statement, had power to postpone his security to the security intended to be by the indenture now in statement created; and against incumbrances in respect of the said clay, bricks, machinery, plant, live and dead stock, goods, chattels, property, and effects.

Then, after a covenant by William David Simpson with
 * 10 Daniel Green, that he William David Simpson * was absolutely entitled to all and singular the said clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects, and property thereby intended to be assigned, and (subject nevertheless as aforesaid) had power to assign the same in manner aforesaid, William David Simpson, by the indenture now in statement, gave and granted to Daniel Green, his executors, administrators, and assigns, or his or their agents or servants, full license, power, and authority at all times during the continuance of the security now in statement to enter into or upon the brick-field, and the messuages, workshops, and other erections there situate, and thereon to remain and to seize and hold possession of and sell all and every the clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects, and property which "may then" be in, upon, or about the said premises, in such and the like manner as if the same formed part of the chattels and effects thereby assigned or intended so to be; and that nothing therein contained should interfere with the aforesaid agreement for placing and continuing a person in possession of the said live and dead stock, goods, chattels, effects, and property by and on behalf of Daniel Green, his executors, administrators, and assigns, if and when he or they should think fit.

Daniel Green was the agent and manager of William David Simpson in his brick-making business, and as such was in the habit of receiving and paying moneys on his account. At the date of the indenture of the 26th of May, 1859, William David Simpson was considerably indebted to Daniel Green on the balance of the accounts between them, but not to such an extent as 3000*l.*, the sum named as the consideration money in the indenture in question; and by a memorandum signed by Daniel Green contemporaneously with that indenture, it appeared that at that date
 * 11 — of the sum of * 3000*l.* mentioned in the indenture — a sum of 2250*l.* or thereabouts only had been then advanced to William David Simpson by Daniel Green; and in consideration of the execution by William David Simpson of that indenture, Daniel Green undertook to charge interest only on such part of the 3000*l.* from the time the same or any part thereof had or should be advanced and paid by him. William David Simpson

deposed that the indenture of the 26th of May, 1859, was in fact made and executed as a collateral security to Daniel Green for the balances due or to become due to him from William David Simpson in respect of advances made or to be made by Daniel Green on William David Simpson's account in the course of his dealings as William David Simpson's agent and manager aforesaid.

Neither Daniel Green (who continued down to his bankruptcy to be William David Simpson's agent and manager) nor any person claiming under him ever gave or left for William David Simpson any notice requiring, or ever received from him, possession under the provisions of the indenture of the 26th of May, 1859, or exercised the power of sale therein contained. The business, nevertheless, continued to be carried on, with consequent and constant alterations of the stock in trade and other effects belonging to it; and also, as was alleged, of the amount of Daniel Green's claim against William David Simpson.

On the 13th of June, 1859, Daniel Green, being likely to become, as he afterwards became, indebted to the appellants, who were his bankers, deposited with them the title-deeds relating to the brick-field, and also the indenture of the 26th of May, 1859, accompanying the deposit with a memorandum that it was * to secure all and every sum or sums of money which * 12 Daniel Green might become indebted or liable to the appellants on any account, either alone or jointly with any other persons.

No notice of this transaction was given to William David Simpson until after Daniel Green became bankrupt in October, 1860, as herein after is mentioned; and William David Simpson deposed that he was wholly ignorant that any such deposit had been made until after Daniel Green's bankruptcy.

On the 18th of October, 1860, as the result of divers monetary transactions and dissensions between John Reeve, the plaintiff in the first suit, and William David Simpson and Daniel Green, an indenture of that date was executed, which was expressed to be made between William David Simpson of the one part, and John Reeve of the other part. By this indenture William David Simpson granted, sold, and assigned to John Reeve, his executors, administrators, or assigns, all and singular the prepared clay and earth ready for manufacture of bricks and stock of bricks, machinery, live and dead stock, chattels and effects in, upon, and about the

brick-field, and used by William David Simpson in connection therewith (and which were then partly enumerated in the schedule thereunder written), and all the benefits, advantages, and emoluments to arise therefrom, and all the right, title, interest, property, claim, and demand, both at law and in equity, of William David Simpson of, in, or to the said premises and every of them subject, to a proviso for avoidance of the indenture now in statement on payment by William David Simpson, his executors, administrators, or assigns, on demand to John Reeve, his executors, administrators, or assigns, of the sum of 2159*l.* and interest thereon.

* 13 And * William David Simpson thereby warranted the said clay, stock of bricks, machinery, stock, chattels, and effects thereby assured to John Reeve, his executors, administrators, and assigns, against all persons whomsoever, subject, nevertheless, to two prior securities, one held by Daniel Green and the other by Thomas Hendrick; being the securities created by the herein before stated indentures of the 12th of January, 1858, and the 26th of May, 1859.

This indenture was registered under the Bills of Sale Act; and after demand and default in payment, John Reeve, on the same 18th of October, 1860, and, as he alleged, with the privity and assent both of William David Simpson and Daniel Green, and under and by virtue of his security, entered in and upon the brick-field, and took exclusive possession of all the prepared clay and earth, stock of bricks, engines, machinery, live and dead stock, chattels, and effects then in, upon, or about the brick-field, paying out certain executions which had antecedently been put in. He sold some parts of the property of which he had taken possession, and entered into contracts for the sale of other parts.

William David Simpson deposed that when John Reeve took possession as aforesaid none of the prepared clay, earth, or materials, or manufactured bricks which were on the premises on the 12th of January, 1858, or on the 26th of May, 1859, existed on the premises, unless it were some of the bricks usually left on a brick-field for placing round the clamps in the succeeding year's operations; and that all the said prepared clay, earth, materials, and the produce thereof, and the said manufactured bricks, had been manufactured, sold, and disposed of, and removed, save as aforesaid, from the premises long before the 18th of October, 1860.

* On the 24th of October, 1860, Daniel Green presented a * 14 petition for adjudication of bankruptcy against himself, which was accordingly made, and assignees were appointed. They also entered into possession of the property so in the possession of John Reeve as above-mentioned, and claimed to hold it by title paramount to his. They also gave notice of their claim to the persons with whom John Reeve had entered into contracts as above-mentioned, and required them not to pay the contract moneys to him.

The bill in *Reeve v. Whitmore* was consequently filed in November, 1860, for the purpose of settling the priorities of the claimants, and seeking payment of what was due to them by means of a realization of the property. The appellants were not parties to the original bill in *Reeve v. Whitmore*. In fact, they only gave notice of their claim to John Reeve, the plaintiff in that suit, on the 18th of December, 1860. They filed their own bill in *Martin v. Whitmore* on the 15th of March, 1861, with the object of enforcing their own claim. In the mean time, but subsequently to the institution of the suit of *Reeve v. Whitmore*, William David Simpson became bankrupt. The assignees of the two bankrupts, by their respective answers in the suits, disclaimed. The property in dispute was sold by arrangement in the suit of *Reeve v. Whitmore*, under an order of the 13th of December, 1860.

On the hearing of the two suits before his Honor the Vice-Chancellor KINDERSLEY, the decretal order under appeal was made.

The second inquiry directed by the order under appeal, and which is referred to above, was an inquiry whether the assignees in bankruptcy of Daniel Green * ever, and when * 15 and in what manner, and under what circumstances, seized and took possession of all or any and what part of the clay, bricks, machinery, plant, live and dead stock, goods, chattels, effects, and property in, upon, or about the brick-field and premises at Crayford, and whether or not in exercise of the license, power, and authority granted by William David Simpson to Daniel Green, his executors, administrators, or assigns, in and by the indenture of the 26th of May, 1859.

The account No. 15, also directed by the order under appeal, and above referred to, was an account of what was due for principal and interest upon the security of the indenture of the 26th of May, 1859, having regard to the memorandum signed by Daniel

Green bearing even date therewith, and to the subsequent dealings between Daniel Green and William David Simpson; and if, on taking such last-mentioned account, any thing should be found due upon the security of the said indenture, certain further accounts were directed to be taken.

Mr. J. H. Palmer and *Mr. T. Stevens*, for the appellants, referring to *Holroyd v. Marshall*, (a) *Bromley v. Holland*, (b) *Wood v. Leadbitter*, (c) and *Thomas v. Sorrell*, (d) there referred to, contended that, regard being had to the whole of the provisions of the indenture of the 26th of May, 1859, and the fact that thereby the security of the 12th of January, 1858, which admittedly and in fact, as was recited in the subsequent indenture, assigned chattels to be acquired after its date, was postponed to the later security, — a state of things which was meaningless, unless the
 * 16 latter also extended to after * acquired chattels, — the later security in fact constituted a present equitable contract for the assignment of the future chattels, to which the license to seize them, when they came upon the premises, was intended to give legal effect.

The nature of their argument in other respects sufficiently appears from the judgment of the Lord Chancellor.

Mr. Glassey and *Mr. W. Pearson*, for John Reeve; *Mr. Baily* and *Mr. Fry*, for Thomas Hendrick; and *Mr. Bury*, for the creditors' assignee of William David Simpson, were not called upon.

THE LORD CHANCELLOR. — Having regard to the limited extent of the declarations in the decree with which I have to deal, I do not think it right to interfere with that decree.

The principal question which is concluded by the first declaration in the decree is, whether the assignment by way of mortgage from Simpson to Green operates as a present contract with respect to the bricks and the clay, and the materials that might thereafter be brought upon the premises by Simpson.

If there had been, either upon the face of the deed expressly, or there could have been collected from the provisions of the deed by necessary implication, a contract or agreement between the parties

(a) 10 H. L. Cas. 191.

(c) 13 M. & W. 838, 844.

(b) 7 Ves. 28.

(d) Vaughan, 857.

that the mortgagee should have a security attaching immediately upon the future chattels to be brought on the premises, the mortgagee would have had a present interest in all those materials, whether manufactured or raw, which after the * date * 17 of the security might have been brought on the brick-field.

But it is clear that in the present case, so far as express words are concerned, nothing of the kind is to be found. The language of the instrument is confined to the purpose of its being a contract, and a transfer, touching only the chattels and effects which at the time were on the brick-field. The circumstance that the nature and terms of the present security to Green are brought by the recitals on the face of the instrument into direct contrast with the terms of the antecedent transfer to Hendrick forcibly illustrates this. There is a recital distinctly stating that the contract with Hendrick was not limited to the then existing materials and manufactured articles, but extended also to those that might during the security be brought on the premises ; but for some reason or other the framer of the security to Green declined to follow the example of the earlier security to Hendrick, and limited the operation of the transfer to Green, so far as the transfer was concerned, to the property then upon the premises ; and the transfer follows the recitals of the deed ; and therefore the contract and the transfer are perfectly harmonious and coextensive.

But then there are found in the deed two provisions which exclude the notion of there being at that time any contract, with regard to a present interest in the property to be afterwards acquired ; viz. : first, the stipulation that it should be competent to Green, if he pleased, to put a manager in possession of the brick-field ; and secondly, and most materially, the distinct power which is given to Green in the final clause of the deed to enter upon the premises and seize and dispose of the property in the shape of bricks manufactured and unmanufactured articles which he might find there at that time.

* If those provisions prevent my arriving at the conclusion * 18 that I can imply a contract (to do which, in fact, would be to extend the operation of the deed beyond the distinct words of its operative part and beyond the recitals, and to make the deed have an effect which to a great extent would supersede and render unnecessary the provisions to which I have referred), the inquiry is simply this, whether the deed may not be accurately

represented as being a contract and a security to the extent of all the manufactured articles and raw material and machinery then upon the premises, and a contract that the mortgagees should have a power at any time whenever he pleased of entering upon the premises and seizing the manufactured and raw material that he might find there, even although those things so seized were not upon the premises at the time when the security was originally given. A present contract that the mortgagee shall have a right and an interest attaching immediately by force of the contract upon all that property which *in futuro* may be brought on the premises, is clearly different from a contract that the mortgagee shall have a power of entering upon the premises for the purpose of seizing and taking possession of that future property; and I think that the true extent and operation of the deed now before me was simply this; viz.: that the mortgagee has passing to him by virtue of the contract a right to and a security on and an interest in all the property in existence at the date of contract; and that the security is accompanied by a power enabling him at any time to enter upon the premises and take the future property that may be found there. A power, however, is very different from an interest; and if the extent and limit of the contract be merely that the mortgagee shall have such a power, then an interest will not arise under the power till the power is exercised,

* 19 subject, however, to the observations * which I shall hereafter make with reference to the execution of that right.

I think that the Vice-Chancellor was right in declaring that the instrument of May, 1859, did not operate or take effect as an equitable assignment of any clay, bricks, and so forth, which were not at its date on the brick-field. I think there was no contract that immediately on the execution of the security the mortgagee should have such right, title, and interest with respect to such future property. Had there been, in fact, such a contract, it would have been an assignment, and would have fallen within the principles explained by the House of Lords in *Holroyd v. Marshall*. (a)

The second point to which the decree refers, and which it concludes by declaration, is this: that the appellants, who took an equitable mortgage by way of deposit of this mortgage to Green,

(a) 10 H. L. Cas. 191.

not having given notice of their security to the original mortgagor, are bound by the subsequent dealings between their mortgagor and the original mortgagor in relation to the original mortgage. It has been contended on behalf of the appellants that the *evidentia rei* proves that the original mortgagor, Simpson, must have had notice of the appellants' interest. But even assuming the evidence to extend thus far, that Simpson either knew or had reason to believe that the money he received from Green was obtained from the appellants, it would stop short of giving to Simpson any ground for inference or knowledge that the appellants had become the depositors of this security. Assuming it to be probable that Simpson knew that Green was indebted to his bankers for assistance, I cannot infer that Simpson ought to have known

* that this particular mortgage had been deposited with * 20 those bankers.

The declaration in the decree upon this point also, I, therefore, think perfectly correct.

I think also that, having regard to the inquiries directed by the decree, and which I see no reason to disturb, the Vice-Chancellor was right in not going further to conclude the remaining point, which must be considered as remaining open and unaffected by the decree. That point is this: Reeve was the mortgagee of the equity of redemption which remained in Simpson after the securities in favour of Hendrick and Green, and by virtue of his security he entered into possession of the property on the brick-field at the time of his entry; but Reeve had express notice of the security in favour of Green, and, therefore, of the power thereby given to Green. Whilst Reeve continued in that position, the property not being converted into money, I apprehend that it would have been competent to Green and the assignees of Green (either the appellants or his assignees in bankruptcy) to enter upon Reeve being so in possession. As a matter of fact, the assignees in bankruptcy of Green did enter, but their entry would not avail for the benefit of the appellants, save so far as there was any money due to Green at the time of his bankruptcy upon the security deposited with the appellants. But inasmuch as the Court intervened in that state of things before the realization of the property and whilst Reeve remained in possession, I think that the equities of the parties ought to be determined by a reference to what might have been done by any one of them under the powers given by their security,

and that, therefore, their priorities will be regulated by a reference to those powers. I do not find any necessity for introducing * 21 words into the decree to keep that * matter open, because it is not concluded by any declaration. It will arise more conveniently and certainly after the answers have been given to the inquiries; but I advert to it only for the purpose of observing that I do not consider that point to be at all prejudiced by or involved in any thing that the Vice-Chancellor has done.

I affirm the decree so far as it is appealed from, and dismiss this petition of rehearing with costs.

These cases came again before the Court under circumstances resulting from the present order, and are reported in such subsequent stage in Messrs. Drewry and Smale's Reports. (a)

1863. November 5, 6. Before the Lord Chancellor Lord WESTBURY.

A husband's estates were limited to himself for life, with remainder to such uses as he and his wife should jointly appoint for the purpose of raising money by way of mortgage or otherwise, and, subject thereto, to a termor to raise certain moneys due from the husband, with remainder to the wife for life, and with an ultimate remainder to the husband and wife in moieties. The husband and wife exercised the joint power, and thereby raised money for the use of the husband: *Held* (affirming the decision of the Master of the Rolls), that the case was not one in which the wife's estate had been pledged or charged for the husband's debt; and that, as there was no charge upon her estate, there could be no claim on her part for exoneration as against the husband's moiety of the estate, under the limitations of the settlement subsequent to the joint power.

Two of the settled estates were at the date of the settlement subject to two several mortgages, hereinafter called respectively mortgage A. and mortgage B. A third estate was subsequently charged under the joint power with a mortgage hereinafter called mortgage C. The husband was tenant for life in possession of all three estates, and in 1840 a judgment was recovered against him, which was registered about the same time. In 1841 he became insolvent, and afterwards the interest on mortgage A. was allowed to fall into arrear. On the other hand, the persons claiming under mortgages B. and C., which did not affect the property comprised in mortgage A., were permitted to

(a) Vol. 2. p. 446.

enter into the perception of the rents of the property in mortgage to them, and those rents exceeded the interest on mortgages B. and C., so that the persons claiming under these mortgages had a surplus of the rents in their possession: *Held*, that inasmuch as when the judgment was registered no surplus of the rents was in the possession of the mortgagees claiming under mortgages B. and C., the judgment creditor was subject to the same equity as would affect the tenant for life himself; viz., the obligation to keep down the arrears of the interest on mortgage A. before he could claim to stand in the place of the mortgagees claiming under mortgages B. and C. in respect of the principal moneys paid off out of the rents received by them.

Seemle, that the case would have been otherwise had there been surplus rents in the hands of the mortgagees in question at the date of the registration of the judgment.

Held, however, that the loss must be actually incurred before it could be the subject of set-off.

The costs of an unnecessary party to an appeal ordered to be paid by the appellant.

THIS was an appeal by the defendant William Ryder Durant from parts of a decree made by the Master of the Rolls.

The suit was instituted by a judgment creditor of a deceased mortgagor against the representative of the deceased mortgagee in possession of parts of the mortgaged estates, the assignee in insolvency of the mortgagor, * and the appellant who * 23 claimed in manner herein after appearing under the wife of the mortgagor as defendants. The object of the suit was to effectuate the judgments, and the decision of the Master of the Rolls is reported on some points in Mr. Beavan's Reports. (a)

The decision, there reported as *Scholefield v. Lockwood* (No. 1), formed the subject of the first part of the present appeal; and the circumstances under which it arose, so far as they are material, were as follows:—

At the time of the settlement next herein after referred to, Thomas Dutton, the deceased mortgagor, was entitled to three estates. One of them was subject to a mortgage for 1400*l.*, a mortgage affecting the fee-simple; another was subject to a mortgage, also affecting the fee-simple, for a sum of 3000*l.*

By a post-nuptial settlement dated in the year 1832, and proceeding upon a contract for value between Thomas Dutton and Hannah Dutton his wife, the three estates were limited, subject to the mortgages, to Mr. Dutton for life, remainder to such uses as

(a) Vol. 32, pp. 434—440.

Mr. and Mrs. Dutton should jointly appoint "for the purpose of raising money by way of mortgage or otherwise;" and in default of the exercise of any such power, and subject thereto, to a trustee for a term of years, upon trust to raise such sum, not exceeding 600*l.*, as should be owing by Thomas Dutton in respect of two sums of 300*l.* each, with remainder to the use of Hannah Dutton the wife for her life; and from and after her death, then, as to one

moiety, to Thomas Dutton in fee, and as to the other moiety * 24 of the estate to such uses as Hannah * the wife should appoint by deed or will, and, subject thereto, to herself, in fee-simple.

Subsequently to the settlement, viz., in the year 1837, the joint power of appointment given by it to Mr. and Mrs. Dutton was exercised for the purpose of creating a mortgage for an aggregate sum of 1000*l.*, viz., two separate sums of 600*l.* and 400*l.*

The Lord Chancellor, from whose judgment the present statement of the facts is in part taken, thought that there could be little doubt that this aggregate sum was the debt of the husband, and, in the first part of his judgment, his Lordship assumed that to have been the case.

Thomas Dutton the husband became insolvent in May, 1841, and died in 1858. His assignee had been, as already stated, made a defendant to the bill, but disclaimed at the bar.

Hannah Dutton survived her husband, and died in 1859, having in 1857 exercised the power given her by the settlement of 1832 over one moiety of the settled estates, and settled the moiety in question in such a way as that, subject to her life-estate and the mortgages, the moiety became vested as to one-third in the plaintiff, and as to the remaining two-thirds in the appellant.

It will be seen from what has been said that the mortgage for the aggregate sum of 1000*l.* affected the inheritance of the estates by virtue of the exercise of the joint power; and the wife being entitled under the subsequent limitations to one moiety of the inheritance of those estates, it was insisted, both before the * 25 Master of * the Rolls and again on the present appeal by the appellant, as claiming under the wife, that the mortgage in question was to be regarded as for the husband's benefit alone, and that, inasmuch as by the exercise of the joint power her estate was made subject to such mortgage, she was entitled, to the extent to which her estate was damnified by the charge so created, to

have it exonerated out of the other moiety limited to her husband.

The Master of the Rolls decided against this view. *Scholefield v. Lockwood* (No. 1). (a)

The second point, in respect of which the present appeal was brought, arose in the following way:—

The estates settled by the settlement of 1832 were, in effect and in the result, as has been seen, settled subject to three mortgages; viz., the mortgage for 1400*l.*, that for 3000*l.*, and that for the aggregate sum of 1000*l.*, which latter was vested in the same persons as held the mortgage for 1400*l.* The mortgage for 1400*l.* affected one of the estates; while that for 1000*l.* affected the same estate and the second estate. In effect, therefore, two of the estates were both subject to the mortgages, amounting together to 2400*l.*; the third estate was subject to the mortgage for 3000*l.* All the three estates were comprehended in the settlement of 1832. The husband was tenant for life of them all in possession, and, as already stated, he became insolvent in the year 1841. About a twelvemonth before, namely, in July, 1840, a judgment was recovered against him by Mr. Scholefield, the plaintiff in the suit. That judgment was duly registered about the same time, and the judgment creditor, therefore, became entitled to all the remedies that were given by the Statute 1 & 2 Vict. c. 110.

* From and after the year 1841, the interest on the mort- * 26
gage for 3000*l.* was permitted by the husband and his assignee in insolvency to fall greatly into arrear. On the other hand, the mortgagees of the estates charged with the 2400*l.* were permitted to enter into the perception of the rents, and as the rents exceeded the interest on the mortgages, those mortgagees had a surplus of the rents in their possession.

Under these circumstances, and admitting that to the extent of that surplus, belonging as it would do to the tenant for life, he might be considered as having paid off part of the principal of the mortgage, and that in an ordinary case he would be entitled to stand in the place of the mortgagee as against the inheritance; yet inasmuch as there was a third estate of which he was equally tenant for life, and as to the mortgage upon which he suffered the interest to fall into arrear, the appellant, claiming as a remainder-

man, insisted before the Master of the Rolls, and again on the present appeal, as against the plaintiff as claiming under the tenant for life, that the plaintiff was not entitled in equity to claim the benefit of a charge upon the inheritance, so far as the appellant was interested in it, in respect of the surplus rents that the plaintiff had applied in part payment of the mortgage, unless the plaintiff would give effect to the obligation incumbent upon him of discharging and keeping down the interest on the other mortgage for 3000*l*.

The Master of the Rolls decided this point also against the appellant.

Mr. Hobhouse and *Mr. Wickens* appeared for the appellant; and

Mr. Selwyn and *Mr. E. F. Smith* for the plaintiff in the suit.

* 27 * The following authorities were referred to, viz.:—

On the part of the appellant on the first point, *Lancaster v. Evors*, (a) *Robinson v. Gee*, (b) and *Astley v. The Earl of Tankerville*; (c) and on the second point, *Beavan v. The Earl of Oxford*, (d) *Waring v. Coventry*, (e) *Gresley v. Adderley*, (g) and *Willes v. Greenhill*. (h)

On the part of the plaintiff on the first point, *Jarman on Wills*, (i) and *Jenkinson v. Harcourt*; (k) and on the second point, *Hopkinson v. Rolt*, (l) and 1 & 2 Vict. c. 110, § 13.

Mr. Baggallay and *Mr. Fooks*, for the defendant Charles Turner Lockwood, who was the representative of the deceased mortgagee in possession, took no part in the argument, but merely asked the direction of the Court as to their client's costs of the appeal. The defendant, whom they represented, had been served with notice of the appeal, but he was in the position of a stakeholder with a fund in hand, for which he was accountable, and with which he was ready to deal as the Court thought fit.

(a) 10 Beav. 154.

(b) 1 Ves. Sen. 251.

(c) 3 Bro. C. C. 545.

(d) 6 De G., M. & G. 492.

(e) 2 Myl. & K. 406.

(g) 1 Swanst. 573.

(h) 29 Beav. 376.

(i) Vol. 2, pp. 608, 609, ed. 3.

(k) Kay, 688.

(l) 9 H. L. Cas. 514.

The Lord Chancellor (after stating the facts with reference to the first point under appeal) proceeded as follows : —

It has been long settled in this Court that if the wife's estate be charged or pledged for the debts of the husband, she is entitled to have that estate exonerated. Originally, perhaps, it arose in the course of the Court's administration of the husband's estate, the Court giving the wife * the benefit of the husband's con- * 28 tract or covenant to pay the money, and, by virtue of that transfer of the legal right of the creditor, giving the wife a claim against the husband's estate. But after some time the form of the doctrine assumed a different shape, and then we find the language introduced, — that the wife is to be regarded as a surety for the husband, and that in respect of such contract of suretyship she is entitled to the ordinary rights of a surety ; namely, to have the debt of the principal thrown upon the property of the principal.

It is an extraordinary instance of the power assumed by this Court (which is exemplified in many other instances) of completely superseding and setting aside the common law by the exercise of what was little less than legislative authority ; because the common law says that there can be no contract between the husband and wife except through the medium of a third person ; but this Court, upon the transaction alone, without evidence of any agreement, creates a contract of suretyship between the husband and wife, and proceeds upon that basis to give the wife, as against the husband, the benefit of that contract. It was an extraordinary thing to do originally, but it has been done and settled, and therefore we must abide by it.

This contract of suretyship is derived only from the fact that the estate of the wife, as such, is charged and made amenable for the debts of the husband ; and I must inquire, therefore, whether that is the state of things in the case now before me ; because, if it be not the fact that, strictly and properly speaking, the estate of the wife is, as such, made subject to and charged with these mortgages, I shall neither have authority, and still less inclination, to extend the doctrine so as to include property which, in the hands of the mortgagee, cannot be * properly said to be the * 29 estate of the wife, or to have been conveyed as such by the wife to the mortgagee.

But it is plain that these two mortgages of 600*l.* and 400*l.* were created by the joint power of appointment alone. The wife levied no fine. The wife executed no deed under the statute; the mortgage emanated solely and exclusively from the power; and the estate conveyed is that entire estate which as an undivided whole is subjected to the power, and not the moieties which are created by the subsequent limitations. The ordinary language is found also in this deed after the power and preceding the subsequent limitations; namely, "And in default of such direction, limitation, or appointment, and in case any such shall be made, then, when and as the estates and interests thereby directed, limited, and appointed shall respectively end and determine," the estates are limited to the trustee for the term of years, with remainder subject thereto to the wife for life, with remainder in moieties to the husband and wife. The only estate of the wife, therefore, that I here find, is that estate limited to the wife in default of and subject to the exercise of the joint power. It is not given nor does it arise otherwise than subject to the power and so far as the exercise of the power does not extend. The joint power of appointment was a thing that entered into the original contract between the husband and the wife, upon which this settlement proceeded, and it was created and given for the express purpose of doing that which it has been the instrument of effecting; namely, of raising money by way of mortgage, or otherwise as Thomas Dutton and Hannah Dutton from time to time should appoint. The mortgage, therefore, cannot with propriety of language be described as a mortgage of the wife's estate. From the act of the wife alone the mortgagee takes nothing. The interest of the mortgagee is * no part of that estate or interest which the wife singly had. It has been said at the bar that this is a technical distinction. It is just this distinction, viz.: between the entire and undivided estate which is made subject to the power, and is held by the mortgagee under the exercise of that power prior to the subsequent limitations, and the moiety of that estate which is given to the wife by the subsequent limitations, but subject to and in default of the exercise of the power. The mortgagee takes no interest that was limited to the wife alone. I have, therefore, here a mortgage in which the wife's estate is not included, and as there is no charge there can be no claim for exoneration. I cannot hold that this is a case in which the wife's estate has been pledged or charged for

the husband's debt. The husband incurs no liability from the wife having joined him in the exercise of the joint power, for that was in conformity with the intent and purpose of the settlement.

[His Lordship then stated the facts with reference to the second point under appeal, and proceeded as follows: —]

Having regard to the duty imposed upon the tenant for life, resulting from the relation between him and the remainder-man, I should be of opinion that, as between the tenant for life and the remainder-man, the contention upon the part of the latter would be well founded, and that I could not permit the claim of the representative of the tenant for life to stand in the place of the incumbrancer to the extent to which he had paid off the principal of that incumbrance, unless he also submitted to do equity according to the rule of this Court; namely, to relieve the inheritance from the arrears of interest which, in breach of his ordinary duty, he had permitted to accumulate.

* At the outset of the argument in this case, I was under * 31 the impression with regard to the facts of this part of the case, that at the time when the judgment was registered surplus rents to a considerable amount were in the hands of the two mortgagees; in which case I apprehend that the judgment creditor would have been entitled to be regarded as the specific assignee by way of mortgage of that surplus or the principal paid off by it, and that as such assignee for value he would not have been subject to a claim upon the part of the remainder-man to set off interest which the tenant for life had afterwards permitted to fall into arrear. A tenant for life has all his lifetime to pay off the arrears of the interest, and he cannot be charged with neglect of duty, neither does any right arise to the remainder-man until the death or the insolvency of the tenant for life, and consequently at the time of the judgment there would have been no equity upon the part of the remainder-man.

I find, however, that I was under a misapprehension as to the facts, which are these, viz.: that at the time when the judgment was recovered, no sum of money whatever had been paid by the tenant for life in discharge of the principal of the mortgage; and further, that the tenant for life became insolvent before any portion of the rents received by the two mortgagees could be applied in

part payment of the principal. I have, therefore, no difficulty, in that state of things, in holding that the judgment creditor is to be regarded not as the specific assignee of an existing interest, but as the general assignee by way of mortgage of the life-estate of the tenant for life ; and if he is entitled only to be so regarded, which in truth is the manner in which his counsel has put his case at the bar, then undoubtedly the judgment creditor claiming

to have the benefits incidental to such an assignment of the * 32 life-estate * is subject to the same equity as would affect the tenant for life himself ; and therefore he would be liable, claiming in right of the tenant for life by virtue of that general transfer, to a set-off and equity on the part of the remainder-man ; namely, the obligation to keep down the arrears of the interest, which it was his duty to do, before he could claim, under the same deed which created that duty, the benefit of standing in the place of the mortgagee in respect of the principal moneys paid off out of the rents and profits of the life-estate. Therefore, I think it clear that the defendant, Mr. Durant, in respect of his being the appointee of the wife's moiety of the real estate, is entitled to have the arrears of interest that were permitted to accumulate on the third mortgage during the life of Mr. Dutton set off and satisfied in the first place before the judgment creditor, Mr. Scholefield, is entitled to stand as an incumbrancer against the wife's moiety of the inheritance in respect of that part of the principal of the two mortgages which has been paid off.

But this very peculiar case then arises : It is alleged on the part of Mr. Scholefield that no injury or damage has been done to the wife by reason of the interest on the third mortgage having been allowed to fall into arrear ; because it is said that the wife has not paid those arrears, and never will pay those arrears by reason of the estate comprehended in the mortgage for 3000*l.* being less in value than the principal sum ; and it is said, therefore, that allowing the arrears of the interest to accumulate was no injury whatever to Mrs. Dutton, interested in one moiety of the equity of redemption, which was worth nothing, even if there had been no arrears, seeing that the 3000*l.* was more than the value of the entirety of the fee-simple of the estate. That representation is not admitted to be true on the part of Mr. Durant ;

at the same time, this much is admitted, that Mr. Durant * 33 does not mean to * claim any right to redeem the estate

charged with the 3000*l.*, because he says, "the interest in arrear is 900*l.*; I cannot redeem it without paying 3900*l.*, which is more than its value; but if those arrears had not exceeded 500*l.* I should have been willing to have paid 3500*l.*, and therefore to the extent of the 500*l.* I am damnified." This, I think, must be the subject of inquiry; because if there has been no loss sustained by the remainder-man, undoubtedly there can be no claim to set-off. The loss must be actually incurred before it can be the subject of set-off. I must, therefore, reverse that part of the decree to which this portion of the appeal relates, and declare that in case it shall appear upon the inquiry herein after directed that loss has been sustained by the appointees of the wife by reason of the interest on the 3000*l.* having been allowed to fall into arrear, then, to the extent of the loss so sustained by Mr. Durant, Mr. Durant has a right to claim a set-off against the claim made by the judgment creditor in respect of the money applied out of the life-estate in part payment of the principal moneys due on the mortgages for 2400*l.*; and then direct an inquiry for the purpose of ascertaining what was the value of the estate comprised in the 3000*l.* mortgage at the time of the death of Mr. Dutton, and whether any and what loss has been sustained by Mr. Durant as one of the persons claiming under the wife by reason of the arrears of interest that accrued due during the life of Mr. Dutton.

With reference to the costs of the defendant Charles Turner Lockwood on the appeal, his Lordship directed them to be paid by the appellant, the defendant Charles Turner Lockwood having been unnecessarily brought before the Court on the appeal.

1863. November 10. Before the LORDS JUSTICES.

In a suit for specific performance of an agreement for sale and purchase of land, if the defendant means to set up the Statute of Frauds as a defence, he must do so before the hearing, at which time the defence is not open to him, although he has denied the existence of the agreement altogether.¹ *Per* Lord Justice KNIGHT BRUCE.

Observations on *Ridgway v. Wharton*, 3 De G., M. & G. 677.

THIS was an appeal by the mayor, aldermen, and burgesses of the borough of Burnley from a decretal order made by the Vice-Chancellor of the county palatine of Lancaster in a suit for specific performance of an agreement for the sale of a piece of land. The appellants were the principal defendants, and by the order under appeal specific performance of the agreement was ordered as against them with costs.

The agreement in question was in the pleadings and in the order under appeal described as comprised in two memorandums of agreement, dated respectively the 23d of July, 1859, and the 16th of March, 1860.

Of these the first was as follows, being signed by all parties to it, of whom those other than James Hodgson were the plaintiffs in the suit:—

“Memorandum of agreement dated the 23d day of July, 1859. This is to certify that I, the undersigned James Hodgson, am willing to let the school-house and its appurtenances, situate in Coke Street, Lane Bridge, for the term of one year or more from this date at the rate of three shillings per week, the rent to be paid fortnightly. And we, the undersigned John Heys, Robert Heys, John Latham, Charles Catlow, James Sagar, and John Duerden, agree to take the said school at the above rent for the above terms, and at the expiration for each side to give 'or take six months'

¹ See *Ridgway v. Wharton*, 3 De G., M. & G. 677, note (2), and cases cited; 1 Sugden V. & P. (8th Am. ed.) 149, and cases in note (n). Where no answer was required the defendant has been allowed to plead the statute orally at the hearing. 1 Dan. Ch. Pr. (4th Am. ed.) 656, 657; *Lincoln v. Wright*, 4 De G. & J. 16.

notice before leaving the premises ; that we commence on this day, the 23d July, 1859. I, the said James Hodgson, also agree to * sell the said property to the said parties for the sum of * 35 60l., should they feel disposed to purchase the same within two calendar months from the present date."

On this document being signed, the plaintiffs entered into possession of the property, and subsequent negotiations between the parties resulted in the signature by James Hodgson, on the 16th of March, 1860, of a further memorandum, which was the second of the agreements above referred to, and was couched in the following language : —

"I am willing that the letting of the school-room be prolonged to five years, instead of one, at the usual rent of three shillings per week, and the parties now holding the same to have the chance of purchasing the same school during the same time."

James Hodgson, by his will made in July, 1861, devised the property to John Astley, and died in September, 1861. On the 3d of February, 1862, John Astley sold it to John Tomlinson, who on the 24th of April, 1862, sold it to the Burnley Improvement Commissioners, through whom it became vested in the appellants.

In the mean while the plaintiffs had become desirous of exercising their option of purchasing the property, and accordingly they, on the 17th of March, 1862, served a notice of such their desire upon John Astley, being ignorant that he had in the mean time parted with his interest. On this fact transpiring, the plaintiffs, on the 30th of April, 1862, served a similar notice to that already given to Astley upon John Tomlinson. Astley had taken no notice of the notice served on him ; but Tomlinson, in answer to that served on him, denied the plaintiffs' right to become purchasers, and set up the * defence of purchaser for valuable * 36 consideration without notice. As has been stated, Tomlinson had at this time sold the property to the appellants' predecessors in title. The plaintiffs were continuously in the occupation of the property.

In this state of things, the original bill was filed on the 8th of June, 1862, against John Astley and John Tomlinson as the only defendants thereto ; but the facts with reference to the sale to the

appellants and their predecessors in title coming out upon the answers, the bill was on the 13th of September, 1862, amended, and the appellants added to the defendants to it.

The amended bill expressly charged upon John Tomlinson notice of the agreement entered into by James Hodgson. The appellants, by their answer, set up, as Tomlinson had done, the plea of purchaser for value without notice, denied the existence of agreement which the plaintiffs sought to enforce, and claimed the same benefit as if they had demurred to the bill. They did not, however, either by their answer or by plea or demurrer, raise any defence on the Statute of Frauds.

The suit was heard on the 15th of May, 1863, when the order under appeal was made. By it the bill was dismissed as against John Tomlinson, with costs from the 9th of July, 1862, to be paid by the plaintiffs. John Astley was dead at the date of the order.

Mr. Little and *Mr. E. R. Turner*, for the appellants. — The decision of the Court below is wrong. No equity can be raised out of the terms of the agreement of July, 1850; for, in cases of tenancy with option of purchase within a limited time, the option must as a rule, from which there is nothing in the present case to * 37 make it an * exception, be exercised within that limited time.

Pyke v. Northwood, (a) *Pegg v. Wisden*. (b) Here the plaintiffs did not exercise the option given them within the two months by the agreement limited for the purpose. The agreement then is gone; for it cannot be considered as kept alive by the memorandum of March, 1860. That was an independent document, as is clear from its not containing any such reference to the earlier agreement as would have been necessary to take the case out of the Statute of Frauds, and let in parol evidence to connect the two. *Clinan v. Cooke*, (c) *Hinde v. Whitehouse*, (d) *Dobell v. Hutchinson*, (e) *Ridgway v. Wharton*, (g) *Peek v. North Staffordshire Railway Company*, (h) *Sugden's Vendors and Purchasers*. (i) But being such an independent document, it was not one which could be made the groundwork of a suit for specific performance. So far as it can be called an agreement at all, it is open to many objections, which

(a) 1 Beav. 152.

(b) 16 Beav. 239.

(c) 1 Sch. & Lef. 22.

(d) 7 East, 558, 569, 570.

(e) 3 Ad. & Ell. 355.

(g) On Appeal, 6 H. L. Cas. 238.

(h) 10 H. L. Cas. 473.

(i) 13th ed. p. 111; 14th ed. p. 14.

would prevent its being made the groundwork of such a suit. Thus it is bad for want of mutuality, and it contains stipulations which Mr. Hodgson could not have enforced against the plaintiffs. Again, it is not a sufficient agreement within the Statute of Frauds. Nothing is said in it about the price at which the purchase is to be made: *Clinan v. Cooke*; (a) nor is the property sufficiently defined. It is true that we have not set up the defence on the statute in any way; but we deny the existence of any agreement, and therefore are entitled to take the benefit of the defence. *Ridgway v. Wharton*. (b)

[THE LORD JUSTICE TURNER. — Is there not a later case, in * which we declined to follow that case?] * 38

In *Wood v. Midgley* (c) it was held, that the benefit of the statute might be taken by demurrer, the judgment of the Court going on the fact that it is incumbent on a plaintiff to state facts entitling him to equitable relief. The case of *Ridgway v. Wharton* (d) is referred to by Lord ST. LEONARDS (e) without remark. At any rate, the decretal order should not have been made against us with costs.

They also referred to *Price v. Griffith*, (g) arguing, that even if the memorandum of March, 1860, did sufficiently refer to an antecedent document, there was nothing to show that that antecedent document was the agreement of July, 1859.

Mr. R. C. Christie, for the plaintiffs, was not heard.

THE LORD JUSTICE KNIGHT BRUCE. — Assuming the doctrine of part performance to have no application to this case, I am not convinced that upon any view whatever the Statute of Frauds has any application to it. But if it would or might have been useful to the appellants to seek the aid of the statute, it has not been done; and, in my judgment, according to the rules and course of the court, that not having been done, whatever may be said as to the agreement, the Statute of Frauds cannot be resorted to. (h)

(a) 1 Sch. & Lef. 22.

(c) 5 De G., M. & G. 41.

(b) 3 De G., M. & G. 677.

(d) 3 De G., M. & G. 677.

(e) Sugd. V. & P., 13th ed. p. 122; 14th ed. p. 149.

(g) 1 De G., M. & G. 80.

(h) See *Homfray v. Fothergill*, L. R. 1 Eq. 567, 572.

That being so, the agreement is, in my judgment, on the
 * 39 evidence, plainly and clearly proved and valid; and I * am
 surprised at finding the appellants here. As to costs, I am
 not sure that the appellants have not been too leniently dealt with
 by his Honor the Vice-Chancellor of the Duchy. However, so it
 is; and I think that even if there might have been some considera-
 tion as to the costs in respect of the presence of the other defend-
 ant who has been mentioned, the matter is too trifling to be attended
 to, regard being had to the merits of the case in other respects. In
 my judgment nothing can usefully be said against the decree on the
 part of the appellants.

The costs of the appeal, however, will depend upon the judg-
 ment of my learned brother; in my view, the appeal should be
 dismissed with costs.

THE LORD JUSTICE TURNER. — I do not think it necessary, in the
 view which I take of this case, to say any thing with respect to
Ridgway v. Wharton, (a) before the Lord Chancellor. Nor is it
 necessary for me to give any opinion on the point whether in the
 present case there is sufficient reference in the document of
 March, 1860, to the earlier agreement of July, 1859. I give the
 appellants, therefore, the full benefit of their arguments on these
 points. I will go further, and assume in their favour that the
 memorandum of March, 1860, is to be considered as an independent
 agreement.

What, then, when the case is so considered, was that indepen-
 dent agreement? It was one on the part of Mr. Hodgson to
 extend the term of the lease, and to extend the time for the pur-
 chase for a correlative period. It may well be, that the
 * 40 agreement might be capable of * being enforced only so far
 as respects the extension of the time for the duration of the
 lease. It may well be, that if these tenants had not observed the
 conditions of the agreement, it would not have been in their
 power to avail themselves of the provisions contained in the agree-
 ment extending the period for purchase. But no such case is
 alleged on the part of the appellants, nor is it alleged on their
 part that the tenants were ever in default. There is nothing in
 any way to destroy whatever effect the last clause of the memo-

(a) 3 De G., M. & G. 677.

randum of March, 1860, may have on the period fixed for the exercise of the option by the original agreement. It seems to me that the case is complete on that point. There is nothing in the argument that the memorandum in question might refer to a different agreement.

We must do justice between the parties on the whole case as made before us ; and the prayer for general relief would be sufficient, if necessary, to enable us to do so in the present case. I quite concur with my learned brother in thinking that the appeal should be dismissed with costs.

1863. November 13. Before the Lord Chancellor Lord WESTBURY.

It is irregular for the Court, upon a defendant's motion to dissolve an injunction obtained against him *ex parte*, to grant any new injunction, and especially so if the new injunction is not granted, in the terms of the prayer of the bill.¹

THIS was an appeal by Thomas Herbert Edmands, one of the two defendants to the suit, from an order of the Master of the Rolls granting an injunction. The injunction was not in the terms of the prayer of the bill, and it was made on the appellant's application to dissolve an injunction against him obtained *ex parte* by the plaintiff in the terms of the prayer of the bill.

The case made by the bill was, that the plaintiff in the suit, Robert Burdett, had agreed to purchase from the defendant William Hay the business of a rectifier and wine-merchant, carried on under the firm of Grimble & Co., and that by the agreement for the purchase, dated the 27th of July, 1863, it was agreed that the defendant William Hay should assign to the plaintiff (amongst other things) the books of account, and all and every other the implements and articles and things then used in carrying on the business ; that by a subsequent agreement, dated the 3d of September, 1863, it had been agreed that the books of account and other books, which at that date were not forthcoming, they having

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1618, 1619.

been removed by the orders of the defendant William Hay, should be deposited at the counting-house of the business for the joint benefit of both parties so long as any of the book-debts remain to be got in ; that it was part of the agreement that the book-debts should remain on the books, and be collected by the plaintiff ; and that the defendant William Hay should not at any time thereafter carry on or be concerned, directly or indirectly, in any distillery or business of the same kind as was at the date of the purchase carried on by him.

* 42 * The bill then alleged, that, notwithstanding the agreement, the defendant William Hay had declined to return the books, and had retained the same in order to enable him, in violation of the agreement, to collect the debts of the business ; and that on the 8th of September, 1863, an advertisement had appeared announcing that the partnership between William Hay and the appellant had been dissolved, that neither of them would be in any way responsible for any business that might be in future carried on under the firm of Grimble & Co., and that the appellant would, at an early date, wait upon the customers for further orders.

The bill further stated, that a circular letter, dated the 3d September, 1863, had been also sent to the customers of the late business, stating that the current book-debts due to the late firm would be collected under the sole direction and for the separate account of the defendant William Hay.

The bill prayed, —

(1.) An order upon both the defendants for the delivery up to the plaintiff of all books of account and other books in their possession that had been used in the business, and also of all bills or notes of any customers or persons indebted to the business ;

(2.) An injunction against both the defendants to restrain them from collecting or receiving any book-debts or sums of money due in respect of the business ;

(3.) An injunction against the defendant Thomas Herbert Edmands to restrain him from then or at any time thereafter carrying on or being concerned, either directly or indirectly, in any distillery or business of the same kind as that at the date of the agreement of the 27th July, 1863, carried on by the defendants ;

* (4.) For payment by the defendants of the costs of the * 43
suit; and,

(5.) For further or other relief.

His Honor the Master of the Rolls having, on the 11th of September, 1863, granted an injunction against the appellant in terms of the 3d paragraph of the prayer of the bill on the *ex parte* application of the plaintiff, the appellant moved to dissolve it. On the hearing of this motion, on the 22d of October, 1863, his Honor ordered that the order of the 11th September, 1863, should be discharged, and that in lieu thereof an injunction should be awarded to restrain the appellant, in any business as a distiller and wine-merchant in which he might be engaged, either separately or jointly, from advertising or holding out to the public that he was a partner in the late firm of Grimble & Co., or in any respect interested therein or connected therewith, and also from soliciting the business or custom of any or any one of the customers of the late firm.

This was the order under appeal; and

Mr. W. W. Cooper (*Mr. Hobhouse* with him), for the appellant, having stated the facts,

Mr. Selwyn and *Mr. Beales* were called upon to support the order of the Court below. They argued that the injunction which formed the subject-matter of the appeal was in substance in accordance with the prayer of the bill, which, indeed, asked for more than the existing injunction gave the plaintiff. Moreover, the case was one of fraud on the part of the appellant.

The Lord Chancellor (without calling for a reply) said that there had been considerable irregularity in what * had * 44 been done. An injunction should not travel out of the terms of the prayer of the bill, and must be dissolved, if at all, in the usual way. In the present case the motion to dissolve was perfectly regular, but upon hearing it the Court had, at the instance of the plaintiff in the suit, without any new motion and without further evidence, granted a new injunction against the appellant, quite different from that prayed by the bill, and one which, even assuming the Court to have the power on such a motion of grant-

ing a new injunction, was not in any way comprehended under the relief prayed by the bill. Before bills were printed, it had been usual in terms to repeat the form of the injunction sought by the bill in the prayer of process annexed to the bill. At present the prayer of process no longer formed part of the bill. The rule of the Court, however, remained the same as before; viz., that the injunction granted must be such an injunction as was prayed by the bill and process. But here the injunction sought by the bill was one thing, that granted by the order under appeal a totally different thing. The first assumed that the appellant had been connected with the business; the second that he had not. Upon the merits, as well as upon the technical objection of the irregularity of the substituted injunction having been granted upon the appellant's motion to dissolve, — a motion heard on a correct and proper notice for that purpose, — the appeal must be allowed, and the *ex parte* injunction dissolved, and the appellant must have the costs in the Court below of the motion to dissolve.

BUTLER v. BERRIDGE.

1863. November 14, 16. Before the Lord Chancellor Lord WESTBURY.

The sale of an equity of redemption in a reversionary interest belonging to the mortgagor and in two policies of assurance on his life was set aside on the ground of undervalue.¹ The two mortgaged policies of assurance having in the purchaser's hands been allowed to lapse, and a new policy having been substituted for them by the purchaser: *Held*, that the vendor was at liberty to adopt what the purchaser had done in the matter of the substitution of the new policy, and was on redeeming entitled to the substituted policy as part of the equity of redemption.

Causes being heard on replication, and the bills being dismissed as against one defendant, a codefendant was not allowed to read the dismissed defendant's answer against the plaintiff appealing, but not by his appeal seeking to reverse the dismissal.

¹ See 1 Sugden V. & P. (8th Am. ed.) 275, 276, *et seq.*; *Edwards v. Burt*, 2 De G., M. & G. 55, note (1), and cases cited.

THIS was an appeal by the plaintiff in the second of the above-mentioned suits from part of a decree made by the Master of the Rolls in the two suits, whereby his Honor held that the appellant was not entitled to the proceeds of a policy of 1200*l.* under the circumstances hereinafter mentioned, and decreed accordingly, dismissing with costs, as part of his decree, the bill in the second suit as against all the defendants thereto. The case in the Court below is in part reported in Mr. Beavan's Reports, (*a*) where the facts are fully stated. For the purposes of the present report, the following statement of them is sufficient:—

By two indentures, dated respectively the 1st of January, 1855, and the 19th of November, 1855, Joseph Ray Nesbitt, the plaintiff in the first of the above-mentioned suits, assigned his interest in a sum of 3978*l.* 4*s.* consols, which was subject to the provisions of the will of his late father, General Nesbitt, and two policies effected by himself on his own life for 700*l.* and 200*l.* respectively to a Miss Jackson by way of mortgage for securing 800*l.* He covenanted to keep up the policies, and the mortgage-deeds provided, that in the event of his * making default in so doing, * 46 and the mortgagee entering into possession, she might keep them up and retain the amounts expended by her in so doing out of the mortgaged property.

Miss Jackson did eventually enter into the receipt of the dividends on the stock, and kept up the policies mortgaged to her until the sale to the defendant Charles Bunyard mentioned below.

Joseph Ray Nesbitt, afterwards getting into embarrassed circumstances, agreed on the 10th of December, 1856, with the defendant Simon Abraham Kisch for the sale to him of his (Joseph Ray Nesbitt's) equity of redemption in the policies and in his interest in the 3978*l.* 4*s.* consols, and also an expectant reversionary interest to which he was entitled under his father's will for 75*l.*

Two months afterwards the defendant Simon Abraham Kisch, by way of subsale, sold the purchased property to the defendant Charles Bunyard for 125*l.*; and by a deed dated the 7th of January, 1857, in consideration of 75*l.* paid by him to Joseph Ray Nesbitt, and of 50*l.* paid by him to the defendant Simon Abraham Kisch, the property was assigned by Joseph Ray Nesbitt and the

(*a*) Vol. 32, p. 282.

defendant Simon Abraham Kisch to the defendant Charles Bunyard.

The defendant Charles Bunyard, having allowed the two policies for 700*l.* and 200*l.* to lapse, on the 5th of January, 1859, effected a new policy on the life of Joseph Ray Nesbitt for 1200*l.* Miss Jackson, at the instance of the defendant Charles Bunyard, agreed

to accept this policy in lieu of the two lapsed policies ; and
 * 47 by an indenture of the 21st of January, 1857, it was * assigned to her by way of mortgage accordingly, in substitution for the two lapsed policies, but subject to the provisions of the mortgage-deeds relating thereto. Joseph Ray Nesbitt was no party to this transaction.

Afterwards, the property sold to the defendant Charles Bunyard, with the exception that the existing policy for 1200*l.* now represented the lapsed policies for 700*l.* and 200*l.*, was resold by him through the medium of the defendant Thomas Cave (who shared with the defendant Charles Bunyard the profit acquired by the latter on the transaction) to the defendant Mrs. Berridge, then Miss Rogers, for 500*l.*, and it was conveyed to her by an indenture of the 21st of March, 1857, whereby she covenanted in the usual way to take upon herself Miss Jackson's mortgage. This she did, paying off in fact afterwards the mortgage and taking a transfer of it, and also of the 1200*l.* policy to herself. This policy she kept up at her own expense.

In this state of things, Joseph Ray Nesbitt, in the year 1860, instituted the first of the above-mentioned suits against Mr. and Mrs. Berridge, Simon Abraham Kisch, Charles Bunyard, and Thomas Cave, as defendants, the three last-named defendants being made so by amendment. The bill sought to set aside the sale of the property on the grounds of inadequacy of price, fiduciary relationship, and duress and notice, and asked for consequential relief, but made no claim to the 1200*l.* policy.

In September, 1861, Joseph Ray Nesbitt died, and the amount due on this policy was received by Mrs. Berridge. Thereupon a supplemental suit, the second of the above-mentioned suits, was instituted by the personal representative of Joseph Ray Nesbitt, and in this suit a claim was made to the produce of the 1200*l.* policy also.

* 48 * The two suits came on before the Master of the Rolls on replication, and his Honor, upon the evidence before the

Court, set aside the purchase by Mrs. Berridge on the ground of its being a purchase of a reversion at an undervalue, of which fact she must be held to have had notice. This part of his Honor's decree was not appealed against, and the Lord Chancellor, in giving judgment on the present appeal, expressed his opinion that, circumstanced as the case was, a wise discretion had been exercised in refraining from appealing therefrom, although his Lordship thought there might have been some difficulty in setting aside, on the ground of inadequacy of consideration, a sale of a present and a reversionary interest for one single sum, a difficulty arising from the difficulty of apportioning the purchase-moneys between the present and the reversionary interests,—a case, however, not then in question. The Master of the Rolls, however, with reference to the right to the produce of the 1200*l.* policy, held, that inasmuch as Joseph Ray Nesbitt could not have been compelled to pay the premiums on the policy in the first instance, his representative could not be entitled to its produce, and dismissed the supplemental bill with costs; and from this latter holding, and the portion of the decree which was founded on it, the present appeal was brought.

Mr. Selwyn and *Mr. Birkbeck* supported the appeal.

Mr. Hobhouse and *Mr. Dickenson* appeared for the respondents, Mr. and Mrs. Berridge.

The Lord Chancellor, after stating the facts of the case, said, that in considering the question under appeal, viz., the right of the appellant, as the representative of Joseph Ray Nesbitt the mortgagor, to the proceeds of the 1200*l.* policy, it must be remembered that what the *defendant Charles Bunyard had *49 done in the matter to the substitution of this policy for the lapsed policies, and whereby, in fact, this 1200*l.* policy became subject to the same equity of redemption as that to which the lapsed policies had been subject, he had done in his assumed capacity of assignee of the lapsed policies. But the assignment of those to him having been set aside, that equity of redemption reverted to the original mortgagor. The acts, therefore, of the defendant Charles Bunyard, in his assumed capacity of an assignee, must be taken as acts for and on behalf of the real owner

of the equity of redemption, who was at liberty to adopt such acts if he pleased; and for him the substituted policy was in the hands of the defendant Charles Bunyard, and persons claiming under him, impressed with a trust. It followed that Joseph Ray Nesbitt in his lifetime had been, and the appellant as his representative now was, entitled to claim the benefit of whatever had been done in respect of the equity of redemption, and to redeem the substituted policy in the same way as he could have redeemed the lapsed policies.

That portion, therefore, of the decree of the Master of the Rolls which was under appeal would be reversed, and there would be a declaration that the 1200*l.* policy was part of the equity of redemption, and belonged, by reason of the sale of the equity of redemption having been set aside, to the appellant, as the representative of Joseph Ray Nesbitt. Consequential upon this, that portion of the decree which dismissed the supplemental bill with costs must also be reversed. This dismissal had probably arisen from the fact of the Master of the Rolls having decided against the claim, which was for the first time raised in that suit; but his

Lordship was not prepared to say that that bill was not
* 50 properly or * regularly filed by the representative of the deceased plaintiff, although strictly perhaps it was not absolutely necessary. (*a*)

As to the costs of the suits, (*b*) usually, in the absence of misconduct, in cases like the present, the assignment was set aside and no costs given to either party. It appeared in the present case that a proposition for a compromise had been made by the solicitors of Joseph Ray Nesbitt to the solicitor of the defendants Mr. and Mrs. Berridge prior to the filing of the bill in the first suit. That proposition had not been entertained; yet the claim of the plaintiffs was well founded. On the other hand, the suits had been misconceived, in so far as the defendants Simon Abraham Kisch, Charles Bunyard, and Thomas Cave had been brought before the Court; and the allegations of fraud and misconduct against these defendants were also unfounded. Upon the whole,

(*a*) As to this point, and that objections taken to the supplemental bill at the hearing were too late, *Ranger v. The Great Western Railway* (13 Sim. 368), *Walford v. Pemberton* (ib. 441), had been cited in the argument.

(*b*) As to which *Foster v. Roberts* (29 Beav. 467) had been referred to in the argument.

therefore, his Lordship, thought that, instead of apportioning the costs, the decree should be in favour of the appellant, without costs; and that the special directions as to costs which had been given in the decree of the Court below should be varied accordingly.

Causes being heard on replication, and the bills being dismissed as against one defendant, a codefendant was not allowed to read the dismissed defendant's answer against the plaintiff appealing, but not by his appeal seeking to reverse the dismissal.

A minor question arose during the argument of the present appeal under the following circumstances: As has been stated, the suits were heard on replication, and *the bills had * 51 been dismissed in the Court below as against the defendants Simon Abraham Kisch, Charles Bunyard, and Thomas Cave. On the appeal, *Mr. Hobhouse*, on the part of the defendants Mr. and Mrs. Berridge, proposed to read the answer of the defendant Simon Abraham Kisch as evidence against the appellant. The answer had been verified by affidavit in the manner usual when a cause is heard on replication.

Lord v. Colvin, (a) *Stephens v. Heathcote*, (b) Morgan's Chancery Acts and Orders, (c) were referred to on the point.

The Lord Chancellor declined to allow the answer to be read, saying that the defendant Simon Abraham Kisch had been dismissed, and was, therefore, not a party to the cause, and that the part of the decree dismissing him was not under appeal.

(a) 3 Drew. 222. (b) 1 Dr. & Sm. 138. (c) 4th ed. pp. 170, 186.

SHRUBSOLE v. SCHNEIDER.

1863. November 16. Before the Lord Chancellor Lord WESTBURY.

One of the Vice-Chancellors, on the hearing of a cause and cross cause, directed a trial by jury before himself. Neither party requested the adoption of this course, and it was alleged by one of them to be inconvenient: *Held*, to be a matter resting wholly in the discretion of the Court below, and one which could not be the subject of an appeal.¹

THIS was an appeal by Mr. Shrubsole, one of the defendants in the first and the plaintiff in the second of the above-mentioned causes (which were cause and cross cause), from a direction given by his Honor the Vice-Chancellor KINDERSLEY on the hearing for a trial before himself and a special jury. This direction was not given in consequence of any request by either party; and objections being raised to it in the Court below on the ground that many of the appellant's witnesses were foreigners living abroad, his Honor said, that if a proper case were made for it, their depositions might be received.

Mr. Glasse and *Mr. C. T. Swanston*, for the appellant, having opened the appeal,

The Lord Chancellor was of opinion that a direction given by a Judge, in the exercise of his discretion, requiring a personal examination of witnesses before himself, could not be the subject of an appeal; and without calling upon *Mr. Baily* and *Mr. Renshaw* for the respondent, his Lordship directed the petition of rehearing to stand over.

¹ In New Jersey no appeal lies from an order of the Court granting or refusing an issue. *Black v. Lamb*, 1 Beasley (N. J.), 108; see *Black v. Shreve*, 2 Beasley (N. J.), 455. So in Pennsylvania, *Scheetz's App.* 35 Penn. St. 88. But it is otherwise in Massachusetts. *Brooks v. Tarbell*, 103 Mass. 496, 499; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Wright v. Wright*, 13 Allen, 207. See *Beverly v. Walden*, 20 Gratt. 147; *Wise v. Lamb*, 9 Gratt. 294; *Stanard v. Graves*, 2 Call, 369; *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field*, 8 Gray, 626; 2 Dan. Ch. Pr. (4th Am. ed.) 1076 note, 1463 note.

* In the Matter of The COMPANIES ACT, 1862; * 53

And in the Matter of The WHEAL EMILY MINING
COMPANY.

COX'S CASE.

1863. November 19. Before the LORDS JUSTICES.

In the winding up of an unregistered company, under the Companies Act, 1862:

Held, that a person was rightly placed on the list of contributories in respect of shares belonging to him which he, for the purpose of deluding the public into an exaggerated estimate of the number of shareholders in the company, had had registered in the names of mere nominees for him.

Quære, whether, regard being had to the 200th section of the Act, the nominees ought not to have been also on the list.

THIS was the appeal of John Cox to the Lord Warden of the Stannaries, heard by the Lords Justices under the Statute 18 & 19 Vict. c. 32, § 26, and the Companies Act, 1862, § 124, from a decision of the Vice-Warden, who, affirming the registrar's previous decision, had held that the appellant's name had been properly placed on the list of contributories in the winding up of the Wheal Emily Mining Company in respect not only of 100 shares standing in his own name, but also in respect of 200 shares standing in the names of two persons named respectively Pulley and Gyles.

The facts of the case appear from the judgment of the Vice-Warden, which is set out below. (a)

(a) "In this case an unregistered mining company is in the course of being wound up under an order made on the petition of Samuel Stephens, a contributory of the company, and the question is whether John Cox ought to be placed on the list of contributories, not only for 100 shares, but also for 200 shares standing separately in the cost-book in the names of Pulley and Gyles. It is admitted that the real owner of these 200 shares is John Cox, and that neither Pulley nor Gyles had any interest whatever in, or knew any thing about, the concern, except that Cox had requested them to accept the transfers of the shares from Hugh Stephens, the local agent of the company, from whom Cox also received his shares by like transfer and with full knowledge on the part both of Stephens and Cox that Cox was the real owner of the whole 300, and was to pay the requisite calls on them; in fact, the company may be truly said to have been

* 54 * *Mr. Fooks* (*Mr. Glasse* and *Mr. Roxburgh*, with him) appeared for the appellant.

originally got up by and between Stephens and Cox, with the assistance of three or four other gentlemen. It is proved to my satisfaction that the names of Gyles and Pulley were used as nominal shareholders for the sole purpose of giving a more favourable aspect to the scheme in the share-market; for it is not generally considered satisfactory to those who wish to invest in mines to see that the shares are chiefly in the hands of one or two persons, whose influence will, in fact, overrule the voices of all other shareholders: nor is a company likely to attract shareholders which appears on the face of it to have very few supporters. The witnesses, however, differ as to whether this distribution of shares to nominal holders was at first suggested by Stephens or by Cox. Neither Pulley nor Gyles ever attended any meetings or received circulars for calling them. Gyles is since deceased and without property; Pulley is a retired tradesman, a neighbour of Cox, who thinks he is a man of some property; but neither of them was to be entitled to any benefit from the sale of shares or other profits of the mines.

“On the part of Cox, it is contended that Gyles’s representatives and Pulley ought, as trustees, to be alone put on the list of contributories in respect of these 200 shares; and various cases are cited, which are referred to in Lindley on Partnership, vol. 2, p. 1092, and Supplement, p. 167. Do the facts above stated show that a *bonâ fide* relation of trustees and *cestuis que trustent*, in the sense of the above cases, subsisted between Cox and his nominees?

“If it is to be treated as a question of fact, then I find as a fact that it did not subsist, though, if Pulley or Gyles had attempted fraudulently to appropriate the shares, they would, for this purpose, have been treated at law and in equity as mere trustees. In truth, they were mere names by which Cox chose to call himself in the books of the company for the purpose of profiting by the false colours which the use of them held out; and this device is now relied on for the simple purpose of protecting him (if possible) from personal liability. Under such circumstances, I am of opinion that even if this were a winding up under the Winding-up Acts of 1848 and 1849, or under the Acts of 1856 and 1857, the Court of Chancery would have allowed the name of Cox to be put on the list.

“But, in truth, this is a winding up under the latest Act, the Companies Act, 1862, which gives a different definition to the term ‘contributory’ from that in previous Acts. Under the first Act, that of 1848, § 3, mere liability to the payment of creditors was not deemed sufficient to constitute a contributory. That Act was, indeed, strictly an Act to facilitate the process of accounts as between members and shareholders, and the rights and interests of creditors were unaffected by it. These were left to their former remedies. Under the last Act, both creditors and contributories are parties to the proceeding; both are affected and both are benefited by it, and the older Acts are now wholly repealed. Under the 200th section of the Act of 1862, which applies to unregistered companies, every person is to be deemed a contributory who is liable at law or in equity to pay or contribute to payment of any debt or liability of the company. This distinction has been very properly noticed by Mr. Lindley, in his Supplement, p. 231. What, then, is the effect of this section on the present company and its members?

* *Mr. Baggallay* and *Mr. Rowcliffe*, for the person having * 55
the carriage of the proceedings under the rules * of the * 56
Stannaries Court, supported the order of the Court below,

“ The Wheal Emily Company is a company formed on the principle of a cost-book mine. The constitution of such a company, when not varied by any special rule of the company at its outset, is well known and understood in this Court, and no proof is here required to explain it. It is presumed to be the rule of management in all cases where it is not expressly modified or altered by the company. In this case one of the earliest resolutions of the company, in 1857, provides that it is to be carried on on that principle as practised in the Stannary Court. What, then, is that practice in the case of such a company as this? It is treated as a common-law parol partnership with nearly all its incidents, except that of a *delectus personæ*, and subject to all the customary process and powers of this Court, as sanctioned by usage and recognized and extended by recent Acts of Parliament. Hence each shareholder is liable only to contracts made while he holds shares. If he relinquishes to the company or transfers to a stranger (which on certain conditions he is entitled to do), he neither throws on the company nor transfers to his assignee any antecedent liability of his own. In case of relinquishing his shares, or any of them, he is entitled to and subject to an account with his partners in respect of his past liabilities and his share of the assets, if any; but the company are under no obligation to save him harmless from such contracts, except only in the way of contribution as in case of other partnerships. In the case of a transfer, the transferee is not liable either to the company or to the transferor in respect of any past transactions or any contracts but his own, unless he has agreed to become so, or has so conducted himself as to have recognized or adopted them. The only way in which future shareholders may be affected by past liabilities arises in consequence of the customary lien, which supplying creditors can enforce by Stannary process on the machinery and materials on the mine, as long as they are in the hands of the same company or of the fluctuating shareholders, who from time to time and for the time being become members of it.

“ I believe the correctness of this description will be disputed by no practitioner or experienced miner in the district of the Stannaries. And wherever a different constitution has been incidentally assumed or proved before the Superior Courts, it will be found that the so-called cost-book company has, in fact, worked in some other district or under a special deed of settlement which has departed more or less from the cost-book type. Indeed, it is notorious that as soon as the Joint-stock Companies Act of 1844 exempted cost-book mines from its operation, they had only to call themselves cost-book companies in order effectually to protect themselves from the trouble and expense and the consequences of registration; and to some extent this practice has survived the Joint-stock Act of 1856, which was to exempt cost-book mines within and subject to the Stannary jurisdiction. Hence it should seem that wherever an unregistered mining company is to be wound up, all members, whether ex-members or still on the books of the company, who are liable upon any unsatisfied contract, may be and ought to be put on the list of contributories, whether their liabilities be

and referred to *Chinnock's Case*, (a) *Bunn's Case*, (b) *Hyam's Case*, (c) *Costello's Case*, (d) and the Vice-Warden's judgment and the passages of Mr. Lindley's Treatise therein referred * 57 * to. They also contended that, regard being had to the 200th section of the Companies Act, 1862, and the definition of the word "contributory" therein, not only ought the appellant's name to be on the list, but it ought not to be there alone in respect of the 200 shares.

THE LORD JUSTICE KNIGHT BRUCE. — In my judgment the decision of the learned Vice-Warden was a correct decision. That the appellant was substantially the owner of these 200 shares is undisputed and indisputable. Though in a sense Messrs. Pulley and Gyles may have been, according to one use of the term, trustees for him, yet it was not a trust of the ordinary kind. Their names were used for the mere purpose of holding out untruthfully to the world that the 300 shares were held not by one person only, but by three persons, so as to induce the unwary part of society to suppose that there was a greater number of members in this company than in fact existed. This, I say, is no ordinary trust, and I am not prepared to say, that, even had the Act of 1862 not passed, the result would not have been the same. But, looking at the language of that Act of Parliament and the undisputed facts of the case, I have no doubt whatever that the appellant has been properly placed on the list of contributories in respect of the whole of these 300 shares. Whether or not as to 200 of them some person or persons should not be added, may be a question; and, so far as I am concerned, I have no objection, if it be desired, to express in our order that it is made without prejudice to any application which may be made to add the name or names of any person or persons to, and not in substitution for, that of the

the subject of an action at law or a suit in equity. Mr. Cox is liable to the present debts of the company both at law and in equity in his capacity of real, though dormant, partner in respect of the shares held by him in the names of Gyles and Pulley, and this even though the relation of trustee and *cestui que trust* had really and truly subsisted between them, which, in my judgment, it does not. I therefore order that the name of Mr. Cox do stand on the list of contributories in respect of the 300 shares now standing in his name and in the names of Pulley and Gyles."

(a) Johns. 714.

(c) 1 De G., F. & J. 75.

(b) 2 De G., F. & J. 275.

(d) 2 De G., F. & J. 302.

appellant in respect of those 200 shares. Subject to what my learned brother may * think, I think the appellant must * 58 pay the costs of the appeal.

The Lord Justice TURNER examined the evidence in the case, and said that upon that he was of the same opinion, and for the same reasons. It was unnecessary to consider the question which had been argued on the 200th section of the Companies Act, 1862. That might be discussed when the question was fairly before the Court. At the same time Pulley and Gyles were only the nominees of the appellant to delude the public ; and if they had made themselves parties to such a transaction, they must take the consequences of their acts, whatever those consequences might be.

Appeal dismissed accordingly, without prejudice to any application which might be made to add the name or names of any person or persons to that of the appellant in respect of the 200 shares.

JONES v. GREGORY.

1868. November 20. Before the Lord Chancellor Lord WESTBURY.

A petition of appeal by a plaintiff who sued in *formâ pauperis* was allowed to be set down, although signed by one counsel only.

IN this case, the hearing of the appeal in which is reported above, (a) the plaintiff sued in *formâ pauperis*, and desired to appeal from the decision of the Court below.

Mr. Harding applied on his behalf to have the petition of appeal set down, though signed by one counsel only.

The Lord Chancellor granted the application.

(a) 2 De G., J. & S. 83.

1863. November 24. Before the LORDS JUSTICES.

It is no objection to the admissibility of an affidavit of a party to a cause, who is a solicitor, that it is sworn before a clerk in the employ of the firm of which such party is a member, such clerk being duly qualified to administer oaths in Chancery, and the firm not being — but the town agents of the firm, as independent solicitors, being — the solicitors on the record for the deposing party.¹ *Per* the Lord Justice TURNER, affirming the decision of the Vice-Chancellor WOOD, *dissentiente* the Lord Justice KNIGHT BRUCE.

The rule which forbids the admission of affidavits sworn before the solicitors in the cause or any of their clerks should not be extended. *Per* the Lord Justice TURNER.

Where the mortgagee of leasehold property which was unlet and could not be let, and was consequently unproductive, asked, in a suit for foreclosure or sale, for an immediate sale, under the Stat. 15 & 16 Vict. c. 86, § 48, and the Court below decreed accordingly, the Court of Appeal declined to interfere with what the Court below had done.

THIS was an appeal of the defendant Chidley from a decree of the Vice-Chancellor WOOD, whereby his Honor overruled an objection taken by the appellant to the admissibility of the plaintiff's affidavit; and, in a suit for foreclosure or sale, directed an immediate sale in lieu of foreclosure under the discretion given by the Statute 15 & 16 Vict. c. 86, § 48.

The appellant was the mortgagor. The mortgaged property consisted of a distillery, held upon a lease of which about twenty-five years had still to run. The plaintiff in the suit, who was the senior partner in the firm of Foster, Burroughes, & Co., solicitors, at Norwich, was the first mortgagee. He was in possession. The property was unlet, and, as no tenant could be found, unproductive. The other defendants in the suit were puisne incumbrancers, between whom questions of priority arose with which the plaintiff had nothing to do.

The plaintiff's case rested, in the matter of the evidence in support of it, upon an affidavit of his own. This affidavit had been sworn by him before one of the clerks of his firm at Norwich, a gentleman duly qualified to administer oaths in Chancery.

* 60 The plaintiff's solicitors * in the suit were, not the firm of

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 749, note (6), 891, 892.

Foster, Burroughes, & Co., but the town agents of that firm, appearing, not as agents, but as the plaintiff's independent solicitors.

Mr. Rolt and *Mr. Swanston*, for the appellant, urged first the technical objection that the plaintiff's affidavit was inadmissible, and that consequently, there being no evidence in support of the bill, it ought to have been dismissed.

Mr. Giffard and *Mr. Kay*, for the plaintiff, on the contrary, contended that the plaintiff's affidavit was admissible.

Mr. Rolt, in reply.

On this point, *Re Hogan*, (a) *Wood v. Harpur*, (b) *Goodtitle d. Pye v. Badtitle*, (c) *Read v. Cooper*, (d) *Williams v. Hockin*, (e) and *Hopkin v. Hopkin* (g) were referred to.

THE LORD JUSTICE TURNER. — The preliminary question which we have to decide in this case is, whether an affidavit made by the plaintiff and sworn before a person in his service can be received as evidence.

It is not disputed that an affidavit cannot be sworn before the solicitor upon the record or before any one of his clerks; but I apprehend that the principle upon which that rule was established is, that the solicitor and the clerk must be presumed to have an intimate knowledge * as to the evidence which would * 61 prove material or immaterial to the success of the cause. That principle does not, as it appears to me, apply to the case of a person who happens merely to be in the employment of one of the parties to the cause, for there is no ground for assuming that such a person is acquainted with the circumstances connected with the cause in consequence of that relationship. If such a position were to be maintained, it would be impossible to say to what extent it might not be carried. In my judgment, the rule in question should be confined to the case of solicitors on the record and their clerks.

(a) 3 Atk. 813.

(b) 3 Beav. 290.

(c) 8 T. R. 638.

(d) 5 Taunt. 89.

(e) 8 Taunt. 435.

(g) 10 Hare, App. ii.

I think, therefore, that the plaintiff's affidavit is admissible in evidence in this case.

THE LORD JUSTICE KNIGHT BRUCE. — Upon the admissibility of an affidavit so sworn, as is that of the plaintiff in this cause, I have the misfortune to differ both from his Honor the Vice-Chancellor and my learned brother. In my judgment the objection to this affidavit can be sustained. The Lord Justice, however, agreeing in judgment with the learned Vice-Chancellor, the objection must, of course, fail.

The appeal was consequently heard on the merits, and on them *Phillips v. Gutteridge*, (a) and the Statute 15 and 16 Vict. c. 86, § 48, were referred to.

Mr. Rolt and *Mr. Swanston*, for the appellant, deprecated an immediate sale, and asked for a decree for foreclosure, so as to give the appellant time to redeem.

* 62 * *Mr. Giffard* and *Mr. Kay*, for the plaintiff, and *Mr. Lindley*, for one of the subsequent mortgagees, and who supported the decree of the Court below, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — When, in the month of July, 1863, on this cause coming on for hearing before the Vice-Chancellor, his Honor exercised the discretion vested in him under the statute, by directing an immediate sale, I think, although I should have been very glad, so far as a Judge may express an opinion, to have held a contrary opinion, that his Honor exercised that discretion in a way in which the plaintiff was entitled to ask him to exercise it. I see no ground for interfering with what his Honor on that occasion did.

THE LORD JUSTICE TURNER. — I also think so. I should have been glad to have given this gentleman more time to redeem; but I do not see how it can be done.

Some discussion⁴ ensued as to the costs of the appeal.

(a) 4 De G. & J. 531.

THE LORD JUSTICE TURNER. — There is not enough to take the present case out of the general rule. The unsuccessful party must pay the costs.

THE LORD JUSTICE KNIGHT BRUCE. — I am afraid it must be so.

* In the Matter of The COMPANIES ACT, 1862; * 63

And in the Matter of The GREAT SHIP COMPANY, LIMITED.

PARRY'S CASE.

1863. December 3. Before the LORDS JUSTICES.

A creditor of a company not registered under the Companies Act, 1862, obtained judgment against them, issued execution upon it, and the sheriff went into possession and was about to sell. Some days afterwards a petition to wind up the company under the Companies Act, 1862, was presented, and before any winding-up order was made upon it, an *ex parte* injunction was obtained by the petitioners under the 201st section of the Act, restraining the creditor from further proceedings at law and the sheriff from selling: *Held* (the Lord Justice KNIGHT BRUCE assuming — but doubting as to each point — that where an action has been concluded by judgment and execution levied, a sale under the execution is a “proceeding in any action” within the 201st section of the Act, and, secondly, that, if it is, an *ex parte* injunction could be granted under that section, and the Lord Justice TURNER giving no opinion on the first point), that the Court, having a discretion under the 201st section, ought not to have exercised it in favour of granting the injunction in a case circumstanced as above stated.¹

Remarks on the principles by which the Court should be guided in exercising the discretion vested in it by the 201st section of the Companies Act, 1862. *Per* the Lord Justice TURNER.

THIS was an appeal by Robert Sortin Parry from the refusal of the Master of the Rolls, without prejudice, nevertheless, to the question of the appellant's priority in respect of his judgment, after mentioned, and without costs, to dissolve an injunction which had been obtained *ex parte* by petitioners for a winding-up order against the above-named company before any order had been made for winding up the company. The effect of the injunction in ques-

¹ See 2 Joyce Inj. 1240-1242.

tion was to restrain the appellant from further prosecuting certain proceedings at law, and the sheriff of Lancashire from proceeding to sell the stores and appurtenances belonging to the "Great Eastern" steamship and the furniture in the company's offices at Liverpool under a writ of *feri facias* at the suit of the appellant.

The company was one incorporated under the Joint-stock Companies Acts, 1856 and 1857, and it had never been registered under the Companies Act, 1862. Its objects were to purchase, fit out, and equip the "Great Eastern" steamship and other
 * 64 steam or sailing vessels, * and to despatch them on voyages with passengers and cargoes.

In December, 1862, the company mortgaged the "Great Eastern" to James Thomas Jones and others to secure 100,000*l.*, and in July, 1863, they executed another mortgage of the ship, her stores, and appurtenances to the appellant for 5350*l.*

On the 28th of September, 1863, the appellant entered up judgment against the company in an action brought by him against them in the Court of Queen's Bench, and which had been strongly defended, for 5439*l.*, which included what was due on his mortgage debt, and immediately afterwards issued the above-mentioned writ of *fi. fa.*

On the following day, the 29th of September, 1863, the sheriff of Lancashire, under this writ, entered into possession of the ship's stores and appurtenances and the furniture in the company's office at Liverpool, but not of the ship itself, and was proceeding to sell.

On the 6th of October, 1863, a petition was presented by the first mortgagees, the company's bankers and others, praying a winding-up order against the company; urging that a forced sale (which the petition alleged would extend to the ship itself, that also having been, as the petition alleged, but erroneously, seized by the sheriff) would be detrimental to the shareholders, creditors, and all concerned; impeaching the validity of the appellant's judgment; and stating that steps were being taken at law to invalidate it.

On the 9th of October, 1863, his Honor, upon the *ex parte*
 * 65 application of the petitioners, and on their undertaking * to abide by any order that the Court might make as to damages and to accept short notice of motion to dissolve the injunction thereby granted, granted, amongst other things, the injunction, the refusal to dissolve which was the subject of the present appeal.

On the 9th of November, 1863, the appellant gave notice of motion to dissolve the injunction; and the order under appeal was made on the 21st of November, 1863.

On the same day the usual winding-up order was made on the petition above referred to.

Mr. Baggallay and *Mr. Andrew Thomson* appeared for the appellant.

Mr. Selwyn and *Mr. Swanston* supported the order of the Master of the Rolls.

The nature of the arguments sufficiently appears from the judgments of the Lords Justices.

On the part of the appellant reference was made to Stats. 11 & 12 Vict. c. 45, § 73; 19 & 20 Vict. c. 47, § 80; 20 & 21 Vict. c. 78, § 7; 21 & 22 Vict. c. 60, § 6; 25 & 26 Vict. c. 89 (The Companies Act, 1862), §§ 92, 163, 201, 202.

On the part of the respondents, to Stat. 19 & 20 Vict. c. 47, § 80, and The Companies Act, 1862, §§ 84, 87, 163, 201.

In re The Waterloo Life, &c., Insurance Company (No. 2) (a) was also referred to.

* THE LORD JUSTICE KNIGHT BRUCE. — A creditor, a just * 66 creditor, of an unregistered company called the Great Ship Company, Limited, sued that company for the recovery of his debt, and was strongly opposed. The progress of the action was in consequence slow. Judgment was ultimately in the action against the company fairly and rightfully recovered, notwithstanding all the opposition to the demand, on or before the 28th of September last; and on the 29th of September execution by writ of *fieri facias* was placed in the hands of the sheriff, who on that day, under the writ, well and lawfully seized certain goods belonging to the company.

There had been then no petition for winding up the company; but some days afterwards, namely, upon and not before the 6th of October following, a petition for winding up the company was presented, — presented only, not heard; and three days afterwards an injunction was obtained *ex parte* for the purpose of preventing the

sheriff from selling under the execution. I repeat that at that time there was no order for winding up the company, inasmuch as an order for that purpose was not obtained until the 21st of November.

It is said that the injunction ought not to have been granted; that if there was a discretionary power in the Court to grant the injunction, yet, under the circumstances, the discretion was not exercised in such a manner as should be sustained. It is said, however, that the order to restrain the sale was well made under the 201st section of the last Companies Act,—that of 1862,—which enacts that “the Court may, at any time after the presentation of a petition for winding up an unregistered company,
* 67 and before making an order for winding up * the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company or against the company, as hereinbefore provided, upon such terms as the Court thinks fit.”

As to this section, two doubts have presented themselves to my mind.

The first is, whether, the action having been concluded by judgment and execution, and there being nothing more to be done in it but to raise the money by sale of the goods, such a case is within the language of this section according to its true construction, the words being to “restrain further proceedings in any action, suit, or proceeding against any contributory of the company or against the company.” It has been ably argued on the part of the appellant that the execution in this case was not within the provisions of this section, and I am not sure that the argument is not well founded.

Another point on which I entertain doubt is, whether an *ex parte* injunction can be granted under the terms of this section.

I wish, however, not to say more at present than that as to each of these points I doubt.

But assuming that in neither case is the doubt well founded, assuming that such a case as the present is within the language of the Act, and assuming that an *ex parte* injunction can be granted, I think that the circumstances of the case are not such as to call for the exercise of the judicial discretion of the Court, and that there was no sufficient ground in point of equal justice, as the matter appears to me,—speaking with the greatest

deference, I * need not say, to the eminent Judge before * 68 whom this case has been, — no state of circumstances sufficient to induce the Court to act against a just creditor in lawful possession of a judgment followed by execution, there having been no petition for winding up the company until some days after the sheriff had been in possession.

I therefore respectfully dissent from the order made in this instance, without giving any opinion upon either of the other two points that I have mentioned, except intimating a doubt upon each. In my judgment the order under appeal should be discharged.

THE LORD JUSTICE TURNER. — I agree.

The question, as it seems to me, depends upon the 201st section of the Act. The 87th section has no application, except when an order for winding up the company has been made. The 163d section does not affect the present case, because that section applies only to cases where an execution is put in force after the commencement of the winding up, which (as was correctly pointed out by the respondent's counsel) is after the petition has been presented. But here the execution was put in force before the petition was presented. The question, therefore, is one upon the 201st section of the Act.

In considering that section, I lay out of consideration the point to which my learned brother has adverted, viz., whether this sale under the execution put in force would or would not be a proceeding within the meaning of that section. I give no opinion whatever upon that point. But, at all events, the 201st section gives power to the Court, and puts it entirely in the discretion of the * Court to say whether the proceedings should or should * 69 not be restrained by the order of the Court.

The true question therefore is, what circumstances ought to influence or guide the Court in the exercise of that discretion. In my judgment the Court, in dealing with a question thus dependent on its discretion, is bound to look at the legal rights of the parties, and at the interests not of one class of creditors only, but of each particular class of creditors who may be affected by the decision at which it shall arrive. I think, with all deference to the Master of the Rolls, that there is nothing in this Act of Parliament which gives to the general creditors of this company any right to have their interests consulted in preference to the

interests of the particular creditor whose case may come before the Court. I think it is the duty of the Court to hold an even hand between the interests of all the parties, and I take this section to have been introduced into the Act of Parliament very much with a view to meet cases in which there might have been unfair proceedings on the part of the creditor who is seeking to enforce those proceedings against the assets of the company.

Above all, I think it would be the bounden duty of the Court, in considering the question as to the exercise of its discretion in granting an injunction in cases of this description, to see what would be its duty, or might probably be its duty, if the order to wind up had been actually made, and an application had been made to the Court by the creditor for leave to issue execution ; and I cannot in the circumstances of this case see upon what ground this Court could, after the order had been made, have refused to this creditor a right to proceed under the execution

which has been issued by him. Here is a case of a *bonâ fide* *70 judgment, perfectly * obtained, without any suspicion of fraud, obtained, as my learned brother has said, after great opposition ; execution issued upon that judgment, property seized under the execution, and nothing to stop it, except the power which is given to this Court under the 201st section of the Act. With all due deference to the Master of the Rolls, I think that that power has not been judiciously exercised under the circumstances of this case ; and I think, therefore, that the injunction should be dissolved.

Mr. Freeman, who appeared for the sheriff of Lancashire, but had taken no part in the argument, then asked for his costs of appearing. Their Lordships declined giving them to him, as he had not been served with notice of the appeal motion. Those of his appearance in the Court below, where he had been served, were allowed him.

In other respects their Lordships' order discharged the order refusing the motion to dissolve, and dissolved the injunction, the appellant to have his costs of the appeal and in the Court below, with liberty to the respondents to apply to the Master of the Rolls as to their costs.

* CHAPMAN v. BRADLEY.

* 71

1863. December 5. Before the LORDS JUSTICES.

A domiciled Englishman, a widower with six children, went through the ceremony of marriage with his deceased wife's niece in Neufchatel, in Switzerland, where such a marriage is valid. It appeared, however, that the parties were under the impression that the marriage being good in Switzerland would also be good here. On this occasion a settlement of reversionary personal estate belonging to the husband was executed by him and the lady, the consideration for which was expressed to be the intended marriage, the natural love and affection which the settlor bore for his children by his late wife, and divers other good considerations, and under which the trustees were to hold the property in trust for the settlor, his executors, administrators, or assigns, until the intended marriage should be solemnized, and afterwards upon trusts for the settlor and his intended wife for their lives, or as to the latter her widowhood, with remainder in trust for such of the settlor's children, whether by his former marriage or by the intended marriage, as being sons should attain twenty-one, or being daughters should attain that age or marry: *Held*, that the word "solemnized," as used in the settlement, meant "validly and effectually solemnized," and that inasmuch as there never had been a valid and effectual solemnization according to English law of the intended marriage, and the settlor was dead, without having changed his domicile, the whole beneficial interest in the property comprised in the settlement was vested in him at the time of his death, and that neither the second wife nor any child of the settlor or of the second wife acquired any interest in such property.

THIS was an appeal by the defendant Mary Elizabeth Bradley, one of the six infant children of William Orton Bradley, deceased, the testator in the cause, by his first marriage, from a decretal order made by the Master of the Rolls, which declared that an indenture of settlement of the 30th of September, 1857, was wholly void, and that the share or interest of the testator in the fund therein mentioned and thereby expressed to be conveyed to the trustees of the settlement formed part of his personal estate, and gave consequential directions. The petition of appeal sought to have it declared that the settlement, so far as regarded the trust thereby expressed to be created for the benefit of the testator's children by his first marriage, was valid, and ought to be carried into effect, and to have the decree of * the Court * 72 below, so far as it was inconsistent with such declaration, reversed or varied.

The case in the Court below is reported in Mr. Beavan's Reports. (a)

In September, 1857, the testator, then a widower with six children (of whom, as stated, the appellant was one), went through the ceremony of marriage at Neufchatel, in Switzerland, with the defendant Elizabeth Dorothy Jones, a child of his first wife's sister. The union so constituted was a valid legal marriage according to the law of Neufchatel, although invalid according to that of England. (b) It appeared, however, that the parties were under the impression that the marriage being good in Switzerland would also be good here. The testator was only absent from England for about a fortnight, and did not change his domicile.

In consideration of this second marriage, the testator executed the settlement of the 30th of September, 1857, the validity of which was in question in this suit. The engrossment of it was taken out from England by the parties for execution, and was executed by them in Neufchatel prior to the marriage ceremony.

By this settlement, after reciting (amongst other things) the first marriage and a settlement of household furniture only on the occasion thereof, and that there were six children of such marriage, and that on the treaty for the then presently intended marriage it had been agreed that the testator should assign

* 73 a certain reversionary one-seventh * share to which he was entitled in certain funds, property, and effects to the trustees, to be held by them upon the trusts thereafter declared concerning the same for the benefit of the defendant Elizabeth Dorothy Jones, and the testator, and his children, as well by his said former marriage as of the said then intended marriage, it was witnessed that in pursuance of the said agreement in that behalf, and in consideration of the said then intended marriage, and in consideration of the natural love and affection which the testator bore for his children by his then late wife, and for divers other good causes and considerations him thereunto moving, the testator, with the privity of the defendant Elizabeth Dorothy Jones, thereby assigned to two trustees all that his one-seventh share of the funds, property, and effects above referred to, in trust for the testator, his executors, administrators, and assigns, until the said intended marriage should be solemnized; and from and after the solemniza-

(a) Vol. 33, p. 61.

(b) 5 & 6 Will. 4, c. 54; *Brook v. Brook*, 9 H. L. Cas. 193.

tion thereof upon trust to get in and invest the trust funds and pay the annual income during the joint lives of the testator and the defendant Elizabeth Dorothy Jones, to her for her separate use without power of anticipation, and after the death of either of them to pay the annual income to the survivor of them during his or her life; but as to the defendant Elizabeth Dorothy Jones, so long only as she should be the widow of the testator; and subject thereto, the trustees were to hold the trust funds and the annual income thereof in trust for such of the children of the testator whether by his said former marriage or by the said then intended marriage as being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under it, and if more than one, in equal shares as tenants in common, with an ultimate trust in default of the prior limitations, in favour of the testator, his executors, administrators and assigns, and with the provisions for advancement, * maintenance, education, and otherwise, usual in *74 settlements made on marriage.

The testator died in 1860, leaving the defendant Elizabeth Dorothy Jones surviving and two children by his union with her.

The suit was a creditor's suit for the administration of his estate, and the bill, besides impeaching the settlement on the ground of the invalidity according to English law of the testator's marriage with the defendant Elizabeth Dorothy Jones, alleged that the testator was insolvent at its date, and that it was voluntary and void against his creditors under the 13 Eliz. c. 5.

An ordinary decree for the administration of the testator's estate had been made in a suit of *Bradley v. Bradley* prior to the institution of this suit; but it was alleged that, as the questions raised in this suit were not raised in the suit of *Bradley v. Bradley*, the estate of the testator, which would be forthcoming in that suit, would little more than suffice to pay the costs of that suit, and that, so far as benefit to the testator's creditors went, that suit, and the proceedings in it, were nugatory.

The bill, in the present suit, prayed an administration of the testator's estate on the footing of the declarations and directions therein prayed, which, so far as is material to the present report, consisted of a declaration to the effect that the pretended marriage of the testator with the defendant Elizabeth Dorothy Jones was null and void, and that the trusts by the alleged settlement of the

30th of September, 1857, expressed to be limited from and after the solemnization of what was therein called the intended marriage had not arisen; and that neither the defendant Elizabeth Dorothy Jones, nor her children, * nor the testator's children by his first marriage, were entitled to any interest under the alleged settlement, but that the funds therein expressed to be comprised remained limited by virtue thereof unto or in trust for the testator's executors or administrators, and were distributable accordingly as part of his general personal estate.

The defendants in this suit were the personal representatives of the testator, the surviving trustee of the settlement of 30th September, 1857, the appellant, who represented the testator's children by his first marriage, and Elizabeth Dorothy Jones and her two children by the testator.

Mr. Hobhouse and *Mr. Haddan* appeared for the respondents (the plaintiffs in the suit), and in support of the declarations sought by their bill and above set forth, they referred to *Robinson v. Dickenson*, (a) *Coulson v. Allison*, (b) *Clayton v. Earl Winton*, (c) *Newstead v. Searles*, (d) *Ellerton v. Gastrell*, (e) *Davenport v. Bishopp* (g) *Porter v. Fox*, (h) *Webster v. Boddington*, (i) *Skarf v. Soulby*, (k) *Medworth v. Pope*, (l) *Jarm. Wills*. (m)

Mr. Selwyn and *Mr. Bromehead*, for the appellant, in support of the declaration which was sought by the petition of appeal as above mentioned, referred to *Whalley v. Whalley*. (n)

* 76 *THE LORD JUSTICE KNIGHT BRUCE. — The first trust in this settlement was for the settlor, his executors, administrators, or assigns, until the then intended marriage should be solemnized between himself and the lady therein mentioned. The first question is, what is the meaning to be ascribed to the word "solemnized" as used in that instrument. As used in that instrument it must, in my judgment, mean validly and effectually solemnized.

(a) 3 Russ. 399.

(b) 2 De G., F. & J. 521.

(c) 3 Madd. 302 (n).

(d) 1 Atk. 265.

(e) 1 Comf. 318.

(g) 1 Ph. 689.

(h) 6 Sim. 485.

(i) 26 Beav. 128.

(k) 1 Mac. & G. 364.

(l) 27 Beav. 71.

(m) 2d ed. vol. 2, p. 202.

(n) 1 Meriv. 436.

The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England, and their domicil had not been changed; and the lady was the gentleman's deceased wife's niece. Therefore the marriage ceremony, although it took place at Neufchatel, was as ineffectual as if there had never been any such ceremony at all. The alleged husband (the settlor) is now dead, and therefore there cannot now be any change of domicil.

In that view of the case, the whole beneficial interest in the funds assigned by the settlement remained vested in the settlor until the time of his death.

I am not prepared to adopt the particular language of the Master of the Rolls, because it involves the decision of a point, which I should prefer not to decide, if there be no necessity for so doing. What I should propose to do is this, viz., to declare that as a valid marriage has never taken place between the testator and the defendant Elizabeth Dorothy Jones, the whole beneficial interest in the funds and property comprised in the settlement was vested in the testator at the time of his death, and that neither the defendant Elizabeth Dorothy Jones, nor any child of the testator, or of * the defendant Elizabeth Dorothy Jones, acquired * 77 any interest in such funds or property.

THE LORD JUSTICE TURNER. — I am of the same opinion. The word marriage must be taken to mean a valid and effectual marriage. This is plain from the language of the settlement generally; and from the provision therein made in favour of the children; for it cannot be supposed that there was any intention to provide for illegitimate children as yet unborn. As there has never been any valid marriage, the trust in favour of the testator, his executors, administrators, or assigns, remains in force, and none of the ulterior trusts ever took effect.

FOXWELL v. WEBSTER and Seventy-six other Suits.

1863. November 24. December 3, 7, 21. Before the Lord Chancellor Lord WESTBURY.

One hundred and thirty-four suits were instituted against as many defendants by a patentee for infringement of his patent, and interrogatories were served. Seventy-seven defendants, combining together amongst themselves so as to make four bodies in all, moved, before putting in any answers, that the plaintiff might be directed to proceed with one suit only until it should have been determined or until the validity of the patent should have been finally decided, or until further order; and that the proceedings in the other suits might in the mean time be stayed, or that the time for answering and producing documents might be enlarged, the moving defendants undertaking to be bound by the result of the selected suit so far as the question of the validity of the patent was concerned. The Court, upon terms, and the plaintiff not opposing, made an order with a view of trying before itself the question of validity in the first instance before entering upon the question of infringement.¹

THESE were appeals against an order made by his Honor the Vice-Chancellor KINDERSLEY on four motions which he had refused without prejudice to any application which might be made after the answers of the various defendants against whom the plaintiff was proceeding had been put in, with a view to

* 78 regulate the * course of the numerous proceedings which had been instituted.

The case in the Court below is reported in Messrs. Drewry & Smale's Reports. (a) The circumstances of it were shortly as follows:—

The plaintiff Daniel Foxwell was the assignee of a patent granted to Charles Tiot Judkins for improvements in machinery or apparatus for sewing and stitching, and he had filed 134 bills against different persons as the respective defendants thereto, and *mutatis mutandis* in the same terms to restrain alleged infringements of the patent as altered by a disclaimer of his own duly enrolled. The seventy-seven suits above mentioned and referred to were seventy-seven of these 134 suits. The plaintiff had in 1860, 1862, and 1863, brought actions for infringement against

(a) Vol. 2, p. 250.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 339, 801, 1643, 1644.

one William Frederic Thomas, to whom he had granted licenses to make and vend the patented machines. These actions had respectively ended, as to the first, in the plaintiff electing to be nonsuited; as to the second, in the dismissal of the jury on account of their being unable to agree; and as to the third, in a compromise under which the defendant William Frederic Thomas paid to the plaintiff upwards of 4000*l.* in consideration of receiving from him a free license to work the patent, and the jury thereupon, by direction of the Judge, found a verdict for the plaintiff on all the issues. Immediately after the issue of the last action the plaintiff's solicitor wrote letters to the defendants in the 134 suits, claiming for the plaintiff, as a patentee who had established his rights at law, rights against them respectively as infringers, and requiring submission within three days. This submission not having been made, the 134 bills were filed, and interrogatories * upon them also, but no answers had yet been * 79 put in.

In this state of things, the motions, which were now brought before the Lord Chancellor, were made, being, as was deposed on behalf of the plaintiff, the result of a combination to defeat his patent, organized by "The Makers, Dealers, and Users of Sewing Machines Central Association," a society existing with small monthly subscriptions of its members (amongst whom were the defendants), and the moving parties combining together in making the motions now before the Court. The particulars of these motions were as follows:—

Mr. Rolt (with him *Mr. E. E. Kay* and *Mr. W. H. Bagshawe*) moved on behalf of the defendants in nineteen out of the 134 suits, and by way of reversal or variation of the Vice-Chancellor's order, that the plaintiff might proceed in such one only of the above nineteen mentioned suits in which the motion was made as he should select for that purpose until such suit should have been determined, or until the validity of the patent therein should have been finally decided, or until the Court should otherwise order, and that the proceedings in the other eighteen suits might in the mean time be stayed, or that the time for answering and production of the documents therein might be enlarged, the several defendants to the said suits thereby undertaking to be bound and to abide

by the result of the said suit so to be selected, so far as the validity of the patent was concerned, in like manner as if the same result had been arrived at in the said several suits, or that such other order might be made as should be just for the purpose of deciding the validity of the patent so as to bind the defendants in all the said suits by means of one proceeding only.

* 80 * *Mr. Osborne* and *Mr. C. M. Roupell* moved, on behalf of the defendants (users only of the machines) in seven others out of the 134 suits, and by way of reversal or variation of the Vice-Chancellor's order, to the same effect as that of the first motion, save only that their notices of motion did not ask an enlargement of the time for answering or producing documents.

Mr. Freeling moved, on behalf of the defendants, in eleven others out of the 134 suits, and by way of reversal or variation of the Vice-Chancellor's order, to same effect as that of the first motion.

Mr. Osborne and *Mr. Waller* moved, on behalf of the defendants (of whom two were manufacturers, and the remainder users or purchasers), in forty others out of the 134 suits, and by way of reversal or variation of the Vice-Chancellor's order, in much the same terms as the former motions as to determining the questions in a single suit, but did not ask for an issue as to the validity of the patent, and selected one particular suit (that of *Foxwell v. Jones*) as that which should proceed.

The machines alleged to be infringements of the patent were numerous and diverse, but it was alleged that there was a possibility of grouping the different defendants for the purpose of consolidating the suits.

On behalf of all the moving defendants, it was contended, that the action against Thomas having ended with a consent order, the validity of the patent had not been sufficiently established by the plaintiff to give him the wholesale right of restraining infringements which he here claimed, and that the Court could, in a case circumstanced like the present, try the validity of the patent, suspending for the time the question of infringement,

* 81 * and in support of this contention reference was made to

Chitty's Archbold's Practice ; (a) *Golden v. Ulyate*, (b) *Townley v. Deare*, (c) *Fullagar v. Clark*, (d) *Bacon v. Jones*, (e) *Brown v. Vermuden*, (g) *Findon v. Parker*, (h) *Mayor of York v. Pilkington*, (i) *Adams v. Fisher*, (k) *De la Rue v. Dickinson*. (l)

THE LORD CHANCELLOR. — If you had given me the means of consolidating these suits into batches of defendants all in the same category, I might have striven to break through the ordinary rules of the Court and consolidate the suits in some way ; but you have not done that. Has the plaintiff any objection to this course ; viz., that the defendants should file affidavits stating their objections to the validity of the patent, and giving full information of every combination of machine made, sold, or used by them, and whence obtained, and when used, and full discovery of the profits derived from the machines which have been made, sold, or used by them respectively, the defendants undertaking to pay the royalty demanded on behalf of the plaintiff in respect of each machine, if he should succeed in establishing the validity of the patent and the fact of the infringement ?

Mr. Glasse (who with *Mr. Locock Webb* and *Mr. Theodore Aston* appeared for the plaintiff) agreed to * this on condition * 82 that the defendants would furnish verified models of every machine made, used, or sold by them respectively.

The Lord Chancellor thereupon ordered the motions to stand over upon those terms until the first day of the sittings after term, no proceedings to be taken in the mean time, his Lordship remarking, however, that, in so restraining the plaintiff, he was greatly stretching the power of the Court.

December 3.

Affidavits by sixty-eight of the defendants having been filed in pursuance of the order of the Lord Chancellor, *Mr. Rolt* admitted

(a) 11th ed. p. 1347.

(b) Reg. Lib. 1808, A. 909, stated by the V. C. of England, 11 Sim. 371, 372, 377, and reported under the title of *Goulden v. Lydiat*, 4 Y. & C. 374, n.

(c) 3 Beav. 212.

(h) 11 M. & W. 675.

(d) 18 Ves. 481.

(i) 1 Atk. 282.

(e) 4 My. & Cr. 483.

(k) 3 My. & Cr. 526.

(g) 1 Ch. Ca. 272.

(l) 3 K. & J. 388.

that they did not state the particulars of objections, nor give any account of profits, to do which would be very onerous, and moreover was not incumbent on the defendants in patent suits. *De la Rue v. Dickinson.* (a)

The Lord Chancellor said that the account might be dispensed with for the present, but that the plaintiff was entitled to, and should have, all pertinent discovery as soon as it would be of service to him. His Lordship added, that if he had already, in what he had done, done some violence to the practice of the Court, it was because a case of the present description had never, in all his experience in that Court, come before him; and if he did violence to the practice, it should be carried to the end of doing the plaintiff service by facilitating his proceedings, and saving him from the consequence of instituting so great a number of suits.

* 83 * The matter was then directed to stand over, to give the plaintiff an opportunity of considering the affidavits which had been filed.

December 7.

The matter was renewed on this day; and after some discussion an order was made directing an issue as to the validity of the patent, two of the defendants, Bradbury and Jones, and another to be selected by the defendants amongst themselves, to conduct the trial as representatives and on behalf of the rest, the result to be binding upon the plaintiff and upon all the defendants who were parties to the four motions. All particulars of objections to the validity of the patent pursuant to the Patent Law Amendment Act (15 & 16 Vict. c. 83, § 41) to be delivered to the plaintiff's solicitor within a fortnight. The trial to take place by consent before the Lord Chancellor in Hilary Term without a jury. All questions of costs, as well in the Court below as before the Lord Chancellor, to be reserved, and liberty given to any of the defendants in the other suits to apply to be made parties to that order.

The Lord Chancellor expressed his intention of requesting some mechanician to be present at the trial for the purpose of assisting the Court; but as the parties declined his Lordship's offer to allow

(a) 3 K. & J. 338.

them to join in naming some person for this purpose, no mention of this intended arrangement was made in the order.

December 21.

Mr. Osborne, on this day, moved for an extension of time for a week longer for the delivery of objections to the validity of the patent, and by consent of the plaintiff, and on payment to him of the costs of the application, obtained three days' further time accordingly.

* SIDNEY v. WILMER.

* 84

FITZCLARENCE v. WILMER.

WILMER v. HUNLOKE.

FITZCLARENCE v. WILMER.

1863. December 5, 7, 8. Before the Lord Chancellor Lord WESTBURY.

A testator who had no issue, after prefacing his will with expressions showing his anxiety that his ancestral estate should remain a principal family residence, and his apprehension that a considerable period might elapse before any adult person would become entitled to the full benefit of his estates under the disposition made by him, devised his real estates to the use of trustees for a term of 500 years, and after the determination of the same and in the mean time subject thereto and to the trusts thereof, to the use of trustees during the lives of his two sisters and the life of the longer liver of them, to preserve contingent remainders, and to pay the rents and profits to the trustees of the term, to be applied as therein after mentioned, and such estate to determine in the event of total failure or impossibility of issue of the testator's sisters to take under the limitations therein after contained; with remainder to the use of the first and other sons of his elder sister who should be born within fifteen years after the date of the will successively in tail male; with remainder to the use of the first and other sons of his younger sister born within eighteen years after the aforesaid date; with successive remainders in favour of the first and other daughters of the sisters born within the aforesaid respective periods in tail male and tail general; with remainder to uses in favour of younger sons of Lord De L. which failed; with remainder to the use of his daughters then born or thereafter to be born in the testator's lifetime (according to seniority of age) for life, with a power of cutting timber under the control of the trustees of the 500 years' term; with remainder to the use of trustees to preserve during life tenancies; with remainder to the use of the

first and other sons of each such daughter successively in tail male; with remainders over. The testator then provided for the assumption of his family name and arms by persons and the husbands of persons entitled under his will, and for the shifting of the limitations contained in the will in case of any of them becoming entitled in possession to the mansion and estate belonging to the De L. family.

The trusts of the 500 years' term were, that the trustees should immediately after the testator's death enter upon his ancestral mansion and estate, and thenceforth during the lives of his uncle and his sisters and the survivors and survivor of them, and during the minority of any person who, at the decease of the survivor of his uncle and sisters, might under the limitations of the will be entitled beneficially to the possession of the testator's estates and under twenty-one, receive the rents, keep up the mansion-house and gardens and appurtenances, and manage the estates and direct repairs and improvements; grant leases, sell timber, keep down interest on incumbrances, appoint agents, cut timber to provide for the objects of the will; and out of the residue to pay certain annuities to the testator's uncle and sisters. The testator then provided, that these annuities were not to entitle his uncle and sisters to reside at the mansion-house unless authorized by the trustees so to do, or to interfere in the management of his estates; and he declared that, during minorities, the trustees of the term, but without prejudice to the annuities under his will and other charges, might pay and apply during the lives of his sisters a competent part of the surplus, interest, and income of the said estates to or for the maintenance and education, or otherwise for the benefit of the minors, the trustees accumulating the surplus and investing the same as they should think best; and he directed that such accumulations should be applied in satisfaction of any debts affecting his estates or of legacies, and subject thereto should be subject to the trusts declared of moneys to arise under the power of sale after contained.

He then provided, that the trusts thereby declared for the management of the estates should, after the death of his uncle and sisters, be suspended during the life of any adult person who should become entitled thereto for any estate for life in possession by virtue of the will, and should cease when the uncle and sisters should be dead, and an adult tenant in tail by purchase under the will should become absolutely entitled.

There were powers for the trustees of the term to lease, to open and work mines and grant mining leases, and to sell and exchange with the usual ancillary clauses; under which the moneys to arise from sales and exchanges were to be applied in discharging incumbrances on the settled estates, and subject thereto in the purchase of other hereditaments to be settled to the same uses.

The testator then devised his copyhold and leasehold estates, and certain articles of personal estate, to the trustees of the term, upon trusts to correspond with those declared of the settled estates, and so as to go along with the latter; and bequeathed his residuary personal estate to the same trustees upon trust for conversion into money, to be held on the same trusts as the moneys to arise from sales of the settled estates.

The uncle having died, the elder sister being also dead unmarried, and the

younger sister, who had become the testator's sole heiress-at-law, being still living, married, and having had one only child, which had died before the date of the testator's will, and the eighteen years from the date of the testator's will having expired: *Held*, —

1. That the direction given to the trustees to manage the estates did not involve any suspension of the enjoyment of the estates themselves or interfere with the right of the devisees, save so far as that they might not be entitled to claim the possession of the estates, and that there was no intestacy, no part of the rents and profits of the estates being undisposed of.
2. That immediately subject to the trusts of the 500 years' term the plaintiff, who was the eldest daughter of Lord De L., as the person entitled to the first vested estate for life, became, as from the testator's death, entitled to the surplus rents of the whole of the estates not required for the exigencies declared of the term.
3. That the trust for the accumulation of the surplus rents was not absolute, but limited to the period of time during which there should be, and came into existence only in the event of there being, a minority before the death of the testator's sisters.
4. That the plaintiff was entitled to the immediate possession of the mansion-house, and to the receipt of the surplus rents, she undertaking to perform all those things which the trustees had a right to require under their powers of management, and she and her husband complying with the directions of the will as to the assumption of the testator's name and arms.

THIS was an appeal from a decree made by the Master of the Rolls in the first three suits for the administration of the estate of the late Sir Henry * John Joseph Hunloke, Bart., * 85 of Wingerworth Hall, in the county of Derby, the testator in the cause.

By the decree under appeal his Honor declared that * the * 86 surplus rents and profits of the real estates devised by the testator's will, after providing thereout for all proper payments under the trusts of the term of 500 years created by the will, ought to be accumulated until the death of the defendant, Eliza the Marchioness of Casteja, or until further order, and gave consequential directions. (a) The case is reported in the Court below, in the 25th volume of Mr. Beavan's Reports. (b)

The testator at the date of his will, viz., the 4th of July, 1845, had no issue, and his nearest blood relations were two sisters, Charlotte and Eliza Margaret, and an uncle, James Hunloke. Of the testator's sisters Charlotte was unmarried, as was also his uncle James. The testator's sister Eliza Margaret was the wife

of the Marquis of Casteja, a French nobleman. There had been issue of this marriage one child only, who was born on the 23d of August, 1838, and had died on the 16th of September, 1838, before the date of the testator's will.

Under these circumstances, the testator commenced his will as follows : —

“ Whereas, my estate at Wingerworth has for centuries been the residence of my family, and I am desirous that upon failure of my issue the same should go to some collateral relation of my blood who is likely to live in England, and who will reside on my said estate and keep up the same, as my ancestors heretofore have done, as his principal place of residence, and not as an adjunct to any family estate of greater importance ; and whereas, considering the objects aforesaid, and looking at the state of my relations,

my uncle a bachelor in years and my sisters resident in
* 87 France, and one of them married * to a French gentleman,

I have determined, subject to my sisters or either of them having issue, on settling my estates in manner herein after contained, but making provisions for my said uncle and sister, in a way which I hope they will appreciate ; and whereas, as a considerable period may elapse before any adult person will become entitled to the full benefit of my estates under the disposition made by me, I am desirous as effectually as I can to provide for the management and keeping up of my estates in the mean time, and of investing trustees with the fullest power and discretion in regard thereto, and I have fixed on the most noble William Spencer, Duke of Devonshire, together with my friend Wilmer Wilmer, of Old Palace Yard, Westminster, esquire, to be such trustees, and I express the strongest hope that as an old friend of myself and of my family his grace will consent to act as such trustee, and which consideration and his known character for high honour and probity, and the locality of his property and his residence near Wingerworth, have induced me to select and wish him to act as a trustee : now, for effecting the objects aforesaid, I give and devise all the manors, capital, and other messuages, lands, and other hereditaments of or to which I am or at the time of my decease I shall be seised or entitled in fee-simple, in possession, reversion, or remainder, or which I am empowered to dispose of by virtue of any special power, with their and every of their rights, members,

and appurtenances (subject to and charged with the incumbrances affecting the same, and with the annuities herein after bequeathed, and with such annuities and legacies as I shall or may bequeath by any codicil to this my will), to the uses, upon the trusts and subject to the powers, provisos, and declarations herein after limited, expressed, and declared of and concerning the same."

* The uses so limited by the will were as follows : To the * 88 use of the defendants the Duke of Devonshire and Wilmer Wilmer, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, upon and for the trusts and purposes after expressed and declared. And after the expiration or sooner determination of the said term and in the mean time, subject thereto and to the trusts thereof, (a) to the use of Benjamin Currey and William Currey and their heirs during the lives of his sisters the defendants Charlotte Hunloke and Eliza the wife of the defendant the Marquis of Casteja, and the life of the longest liver of them, without impeachment of waste, in trust by the usual ways to preserve the contingent remainders therein after limited, and to pay the rents and profits of the said hereditaments to the trustees or trustee for the time being of the 500 years' term, to be applied as therein after mentioned, and such estate to determine in case there should be a total failure or impossibility of issue of the testator's sisters to take under or according to the limitations therein after contained ; with remainder to the use of the first and other sons of his sister Charlotte who should be born within fifteen years after the date of the will successively in tail male ; with remainder to the use of the first and other sons of his sister Eliza who should be born within eighteen years after the date of the will successively in tail male ; with remainder to the use of the first and other daughters of his sister Charlotte who should be born within fifteen years after the date of the will successively in tail male ; with remainder to the use of the first and other daughters of his sister Eliza who should be born within eighteen * years after the * 89 date of the will successively in tail male ; with remainder to the use of the first and other daughters of his sister Charlotte

(a) These words " and to the trusts thereof " were omitted from the abridgment of the will in the bill. The Lord Chancellor during the argument remarked upon their materiality.

who should be born within fifteen years after the date of the will successively in tail general; with remainder to the use of the first and other daughters of his sister Eliza who should be born within eighteen years after the date of the will successively in tail general; with remainder to certain uses (which failed) of the sons (other than an eldest son) of Philip Charles Lord De Lisle and Dudley, and (with an intervening use to Benjamin Currey and William Currey and their heirs during life tenancies in trust to preserve contingent remainders) the sons of such sons. And for default of such issue to the use of every daughter of Philip Charles Lord De Lisle and Dudley then born or thereafter to be born in the testator's lifetime (according to seniority of age) for her life, with a power of cutting timber under the control of the trustees of the 500 years' term corresponding with a like antecedent power given to life tenants who should be sons of Lord De Lisle and Dudley; with remainder to Benjamin Currey and William Currey and their heirs during the life of each respective daughter in trust to preserve contingent remainders; with remainder after the decease of each such daughter to the use of the first and other sons of each such daughter successively in tail male; with remainder to the use of the first and other sons of such daughters successively in tail general; the testator's will being, that the eldest daughter of Lord De Lisle and Dudley born in the testator's lifetime and her sons and the heirs male and heirs of their respective bodies should take before the younger of such daughters and her sons and the heirs male and heirs of their respective bodies; with remainders over for the benefit of the younger daughters of Lord De Lisle and Dudley and their issue, and otherwise.

* 90 * And after a proviso for the assumption of the name and arms of Hunloke by persons and the husbands of persons entitled under the will, and for the shifting of the limitations in manner therein mentioned in the event of refusal or neglect so to do within the times mentioned in the will, and another proviso for shifting in manner therein mentioned the limitations contained in the will in favour of any issue of Lord De Lisle and Dudley to or upon whom the mansion and estate belonging to the Sidney family of Penshurst, in Kent, or the bulk thereof, should descend or come for any estate in possession, the will proceeded to declare the trusts of the 500 years' term.

These trusts were to the effect that the trustees thereof should, immediately after the testator's death, enter upon his mansion-house at Wingerworth and the park, pleasure-grounds, and appurtenances, and thenceforth during the lives of his uncle and his sisters and the survivors and survivor of them, and during the minority of any person who, at the decease of the survivor of his uncle and sisters, might under the limitations of his will be entitled beneficially to the possession of his estates and be under the age of twenty-one years, to receive and take the rents of the property comprised in the term, and keep up the mansion-house and all the gardens and pleasure-grounds, offices, and establishments belonging thereto, and manage his estates and direct any repairs and improvements to be made thereon. The same trustees were authorized to pull down and rebuild in any other style or manner, or not rebuild at all, all or any of the buildings about Wingerworth Hall (but not to destroy or alter the fabric thereof), and to alter or improve the hall internally or externally, and remove, replace, alter, or reconstruct all or any of the gardens and shrubberies, and whether by reduction or enlargement as might suit any tenant of the hall, or * with a view to ulterior * 91 beauty, utility, or accommodation. They were also empowered to grant leases, sell timber and underwood, pay annuities, and keep down the interest of incumbrances charged on the estates, appoint solicitors, receivers, bailiffs, and other persons required for the general management of the estates, and to keep a superintending agent to represent them (the trustees); to cut timber so as to provide for the immediate and prospective objects of the testator's will, and particularly that the annuities payable under his will and current improvements and management of the estates might not be diminished or in arrear; to expend at their discretion not more than 1000*l.* a year in improvements; to dispose of not more than 2000*l.* a year in payments or allowances or donations to any Roman Catholic bishops or priests for such charitable purposes as they or he should think proper, and also subscriptions or donations yearly to schools, county or district hospitals, infirmaries or dispensaries, and any further yearly sums to an amount mentioned in the will; and then the testator directed the trustees of the term to pay an annuity of 1000*l.* a year to his uncle James Hunloke for life, and 500*l.* a year to each of his two sisters Charlotte and Eliza

for their separate use, to be increased on the happening of certain events.

The testator then provided that the annuities thereby made payable to his uncle and sisters should not entitle them or any of them or the husbands of his sisters to reside at his mansion-house of Wingerworth, unless authorized to do so by his trustees or trustee, or in any manner whatsoever to interfere in the management of his estates. And he also declared that during the minority of any person for the time being absolutely or presumptively

entitled by virtue of his will to an estate for life or in tail * 92 immediately expectant on the estate for the lives * of his

sisters limited to trustees to preserve contingent remainders in the property thereby settled, it should be lawful for the trustees or trustee for the time being of the term of 500 years, but subject and without prejudice to the annuities under his will or such of them as should be payable and to other charges, to pay and apply during the lives of his sisters a competent part of the surplus interest and income of the said estates to or for the maintenance and education or otherwise for the benefit of the persons, for the time being entitled thereto, the said trustees and trustee accumulating the surplus and investing the same as they or he should think best. And further, that such accumulations should be applied to the satisfaction of any debts affecting his estates, either existing at his death or created under his will, or legacies given by him, and that subject thereto such accumulations should be subject to the same trusts as were thereby declared concerning the moneys to arise under the power of sale therein after contained.

The testator then declared his will to be that the issue, if any, of each or either of his sisters should until twenty-one reside, be educated, and brought up in England, and not be absent therefrom for any longer time, either at one period or at intervals, than three months in any one year; and in default every provision thereby made for his, her, or their mother or for such issue, which otherwise would then be payable under the trusts of the will respectively, were to be suspended and cease during such non-residence, or for the year wherein there might be such absence of the said issue or any of them.

The trustees of the term were then authorized to purchase

other hereditaments, to raise money by mortgage for payment of the testator's debts, mortgage debts * on the estates, * 93 purchase-moneys of other hereditaments, legacies, and otherwise. Then followed a clause authorizing the trustees to give receipts, with a proviso that they might raise moneys on mortgage as aforesaid independently of any residue of the personal estate then remaining in their hands, or whether such residue were ascertained or not, and without taking into account the amount of the personal estate. And the testator provided that the trusts thereby declared for the management of the estates should, after the death of his uncle and sisters, be suspended during the life of any adult person who should become entitled thereto for any estate for life in possession by virtue of his (the testator's) will, and should cease when and so soon as his uncle and sisters should be dead, and an adult tenant in tail by purchase under his will should become absolutely entitled thereto.

Then followed a proviso for cesser of the term upon full performance of the trusts thereof, and payment of costs attending the same, with a power to the trustees thereof, during the lives of the uncle and sisters and the lives and life of the survivors and survivor of them, and during such further period as the testator's estates should not be vested in possession in an adult tenant for life or tenant in tail under his will, and to every person being of the age of twenty-one years who should by virtue of the limitations therein before contained be in the actual possession of or entitled to the rents of the settled estates, to lease the mansion-house, park, pleasure-grounds, and appurtenances for twenty-one years ; with a power to the trustees and the survivor of them, and the executors or administrators of such survivor, during the lives of the testator's uncle and sisters and the lives and life of the survivors and survivor of them, and during such further period as his estates should not be vested in possession * in * 94 an adult tenant for life or tenant in tail under his will, and to every person (being of the age of twenty-one years) who should by virtue of the limitations therein before contained be in the actual possession of or entitled to the rents of the settled estates, to open and work mines and to grant mining leases. Then followed a power to the trustees and the survivor of them, and the executors and administrators of such survivor, during the lives of the testator's uncle and sisters, and the lives and life of

the survivors and survivor of them, and during such further period as the settled estates should not be vested in possession in an adult tenant in tail under the will, but during such period as the estates should be vested in possession in an adult tenant for life under the will with the consent of such person, to sell or exchange lands, with the exception of the mansion-house, park, pleasure-grounds, and other appurtenances, and any other lands or tenements in the parish of Wingerworth, with the usual ancillary clauses.

Under these clauses the moneys to arise from sales and exchanges were to be applied in discharging incumbrances on the settled estates, and, subject thereto, in the purchase of other hereditaments to be settled to the same uses, upon the same trusts and subject to such and the same powers and provisos as were in the will expressed concerning the settled hereditaments, or as near thereto as the deaths of parties, the nature of the tenure or other circumstances would admit, yet so that leaseholds thus purchased should not for the effect or purpose of transmission vest absolutely in any tenant in tail by purchase of the settled estates who should not attain twenty-one; and in the interim such moneys were to be invested and the interest was to be paid and applied to the
 * 95 persons and for the purposes to whom and for * which the rents of the estates to be purchased therewith would be payable if the purchase were then made.

Then followed a general devise to the defendants the Duke of Devonshire and Wilmer Wilmer, their executors, administrators, and assigns, of all the testator's copyhold and leasehold estates, and the family pictures and portraits, and a tortoise-shell cabinet, reputed to have been given to one of the testator's ancestors by King James the First of England, upon trusts to correspond with those declared of the settled estates, so that these properties might go along with the settled estates, yet so that for the effect or purpose of transmission the leaseholds should not vest absolutely in any tenant in tail who should not attain twenty-one years.

Then, after forgiving certain debts, the testator gave and bequeathed all the residue of his personal estate and effects whatsoever and wheresoever not therein before specifically bequeathed, and which should remain after payment of his just debts, funeral and testamentary expenses, and such legacies as he might give, to the defendants the Duke of Devonshire and Wilmer Wilmer,

their executors, administrators, and assigns, for conversion into money, to be held on the same trusts and subject to the same provisions as were therein before declared of and concerning the moneys to arise from the sale of his estates therein before devised and settled under the power of sale therein before contained.

The testator then empowered the duke and Wilmer Wilmer, or the survivor of them, or the heirs, executors, or administrators of such survivor, or other the trustees or trustee, if and so long as he or they should think fit, to keep all or any of the furniture in or about Wingerworth Hall and its appendages unsold and for the use of * the trustee or trustees, or the agent, or * 96 servants and labourers under him or them, with power for such purpose to add to or alter or replace the same. The produce of such furniture and effects when sold he directed to be held and applied as part of the moneys to arise from the sale of his estates therein before devised and settled under the power of sale and exchange.

The testator then gave two annuities, which he directed should be raised by the duke and Wilmer Wilmer out of the rents of part of the devised estates in the parish of Wingerworth, and one of them, during the minority of the annuitant, to be applied at their discretion.

Then followed the usual trustee clauses, that for the appointment of new trustees vesting the power of appointment in the trustees or trustee for the time being of the 500 years' term during the lives of the testator's uncle and sisters and the lives and life of the survivors and survivor of them, and also during such further period as the settled estates should not be vested in possession in an adult tenant for life or adult tenant in tail under the will, and if vested in an adult tenant for life in possession, then after the death of the uncle and sisters in such tenant for life; a devise to the duke and Wilmer Wilmer of trust and mortgage estates, and an appointment of them as executors.

By three codicils, all dated the 14th of December, 1855, the testator gave certain annuities, which he directed to be raised by his executors out of his real estate in exoneration of his personal estate.

The testator died on the 8th of February, 1856, and * his * 97 uncle James (who on his death succeeded to the title) on the 22d of June, 1856.

The original bill in *Sidney v. Wilmer* was filed by the appellant on the 25th of November, 1856.

At that time the testator's sisters (Charlotte and Eliza Margaret) were his coheiresses at law, and they and his mother (the defendant Dame Anne Hunloke) were his only next of kin. Charlotte Hunloke had never married; Eliza Margaret was the wife of the Marquis of Casteja, and was with him resident in France, and no further issue had been born to them. The testator's will had been proved by the defendants Wilmer Wilmer and the Duke of Devonshire, and they had accepted the trusts thereof. The defendant Wilmer Wilmer, who was a solicitor, and had prepared the testator's will, was, however, the acting trustee and executor, and the bill charged him with having, contrary to the wishes of the duke, established himself and his family in residence at Wingerworth Hall, and in other ways assumed to act as owner instead of trustee of the property, and without regard to the interests of the beneficiaries.

Philip Charles Lord De Lisle and Dudley, mentioned in the testator's will, had died in the testator's lifetime, having had (besides infant children who had died in the testator's lifetime) only one son and three daughters. Of these daughters, the appellant, then the Honourable Adela Augusta Wilhelmina Sidney, was the eldest, and she had attained her majority in the testator's lifetime. The defendants, the Honourable Ernestine Wellington Sidney and Sophia Philippa Sidney, were the younger daughters. All three were unmarried, and the youngest was still an infant.

* 98 * The bill, which was filed against Wilmer Wilmer, the Duke of Devonshire, Dame Anne Hunloke, Charlotte Hunloke, the Marquis and Marchioness of Casteja, when they should come within the jurisdiction, and the Misses Sidney, as defendants, sought, in consequence of the alleged misconduct on the part of the defendant Wilmer Wilmer, and, as it alleged, with the concurrence of the Duke of Devonshire, the appointment of a receiver.

It is also alleged that, in the events which had happened, the first beneficial estate both in the real [estate] and residuary personalty devised and bequeathed by the testator's will was the estate for life vested in the appellant, subject nevertheless to be postponed in the event of any children of the testator's sisters Charlotte and Eliza being born within such periods as would entitle them to take under the limitations prior to the appellant's estate, which periods

would expire respectively on the 4th of July, 1860, and the 4th of July, 1863. And the appellant claimed as such first tenant for life to be entitled in the mean time to the surplus rents of the real estate, and the surplus income of the personal estate and any accumulations thereof which might accrue or have accrued during the period of suspense from the testator's death until the contingency of any children capable of taking under the limitations of the will, being born to his sisters Charlotte and Eliza respectively, should have been determined.

The bill prayed (amongst other things) the establishment of the testator's will and the administration of his estate, a declaration that the appellant was entitled to the surplus rents and income of the testator's estate (after keeping down the interest of the charges thereon and the annuities given thereout by his will) from the * date of his decease and payment of the same * 99 accordingly, and proper directions for raising the annuities charged by the will and codicils on the *corpus* of the estate.

The bill was afterwards amended, and, as amended, after stating that the defendant Wilmer Wilmer had retired from the occupation of Wingerworth Hall, claimed on the part of the appellant to have that mansion-house and the park, grounds, gardens, and appurtenants at Wingerworth let, with the option on her part of immediately entering into the actual occupation of it and them herself, and prayed a declaration of her right so to do.

The appellant, on the 2d of December, 1856, after the institution of the suit, married the Honourable Frederick Charles George Fitzclarence, and a settlement was executed on that occasion, which was dated the 12th of November, 1856. Of this settlement Sir Edward Clarence Kerrison, Sir Joseph Paxton, and John Marmaduke Teesdale were the trustees, and it contained a covenant to settle after acquired property of the appellant, including the hereditaments to which the appellant might be entitled during her life under the testator's will, with a covenant by the husband for the performance of the directions as to the name and arms of Hunloke contained in the testator's will. A supplemental suit of *Fitzclarence v. Wilmer*, being the second of the above-mentioned suits, was instituted in order to bring the appellant's husband and trustees before the Court; and the bill in this suit sought the directions of the Court as to the time and mode at and in which the

directions of the testator's will with respect to the name and arms of Hunloke ought to be complied with by the husband.

* 100 * *Wilmer v. Hunloke*, the third of the above-mentioned suits, was a suit in the nature of a cross suit instituted by the defendant Wilmer Wilmer (as plaintiff) against Charlotte Hunloke, the Marquis and Marchioness of Casteja, Dame Anne Hunloke, Mr. and Mrs. Fitzclarence, the Misses Sidney, and the Duke of Devonshire, as defendants.

At the time when these three suits were heard before the Master of the Rolls, the Duke of Devonshire was dead. Charlotte Hunloke had also died unmarried. The Marquis and Marchioness of Casteja, the latter of whom had become the testator's sole heiress-at-law, and who had still no issue living, were out of the jurisdiction. The period of eighteen years, however, from the date of the testator's will, within which children of hers to have taken at all under the testator's will must have been born, had not expired, and the appellant's title was consequently contingent only.

This eighteen years' period expired on the 4th of July, 1863, without further issue having been born of the marchioness; and the appellant's title having thus become indefeasible, she, on the 7th of July, 1863, presented the present petition of appeal against the Master of the Rolls' decree.

Wilmer Wilmer having died in the interval, his personal representative (Anne Wilmer) was brought before the Court by way of revivor in the fourth of the above-mentioned suits.

The Attorney-General (Sir ROUNDELL PALMER), *Sir Hugh Cairns*, and *Mr. Hemming*, appeared for the appellant, and in support of her claims referred to * *Davidson v. Foley*, (a) * 101 *Sidney v. Shelley*, (b) *Turton v. Lambarde*, (c) *Ackroyd v. Smithson*, (d) *Gibson v. Lord Montfort*, (e) *Genery v. Fitzgerald*, (g) and *Ackers v. Phipps*. (h)

Mr. Giffard and *Mr. Rasch* appeared for Anne Wilmer.

Mr. Rolt and *Mr. F. Riddell*, for the Marquis and Marchioness

(a) 2 Bro. C. C. 203.

(b) 19 Ves. 352, 358.

(c) 1 De G., F. & J. 495.

(d) 1 Bro. C. C. 503.

(e) 1 Ves. Sen. 485, 491.

(g) Jac. 468.

(h) 3 Cl. & Fin. 665.

of Casteja, referred to the cases already mentioned, and also *Hopkins v. Hopkins* (a) and *Tregonwell v. Sydenham*. (b)

Mr. J. Hinde Palmer and *Mr. Knox Wigram* appeared for the Misses Sidney, and

Mr. Everitt, for the trustees of the appellant's marriage settlement.

The arguments turned almost wholly upon a minute criticism of the language of the testator's will, and, so far as they are material to the present report, their scope sufficiently appears from the Lord Chancellor's judgment.

THE LORD CHANCELLOR. — The testator's heiress-at-law contends that all the rents and profits of his estate not required for the purposes of the term in the shape of management or in the shape of * annuity, are undisposed of during the lives of * 102 his two sisters and the life of his uncle, and consequently belong to her.

She insists, in the first place, upon an intestacy during that period of time.

As far, however, as the intestacy is concerned, the chain of legal estates given by the will is complete, and presents no chasm or opening whatever. There is a gift to the trustees for 500 years, with remainder to the trustees to preserve during the lives of the sisters or until the expiration of eighteen years from the date of the will, if during that period of time no child should be born to either of the sisters, with remainder to the younger sons of Lord De Lisle for life, with remainder to their issue, with remainder to the first and other daughters of Lord de Lisle in like manner.

With regard to the devise of the beneficial interest, it is, in my judgment, equally unbroken; because, so far as the term is concerned, the will in fact declares (regard being had to the settled rule of law upon the subject) that the term and the ownership by virtue of that term shall, subject to the express purposes of the term, accompany and be moulded so as to fit and go along with the dispositions made by the subsequent devises. So much, therefore, of the beneficial interest as is required for the purposes of the

(a) 1 Atk. 581.

(b) 3 Dow, 194.

term is first given away, but, subject thereto, the beneficial interest follows the devises, and the legal term also accompanies those estates which are given by the subsequent devises.

But the claim on the part of the heiress-at-law is mainly founded upon the peculiar language of the trusts of the term, and
 * 103 her proposition is this: that those trusts * are so worded as to suspend any enjoyment or beneficial right of possession arising in favour of any individual during the lives of the testator's sisters and the life of his uncle and the life of the survivor of them.

If that be clearly and unmistakably said, effect must be given to it; but the proposition is a singular one, and one which would have extraordinary consequences, calling, as it does, upon the Court to hold that, consistently with the declared intention of the testator, if there were a son of one of his sisters born immediately after the date of his will, and attaining majority within a few years after his death, bearing the name and arms of the testator, that son, his nephew, should not be admitted to have any enjoyment whatever of this estate; but that it should remain in reality without any owner or representative under the will during the indefinite period that might continue for the lives of the testator's two sisters and uncle and the survivor of them. That is a proposition irreconcilable with the language with which the testator begins his will, and his declaration of his desire that some person should reside on his estate and keep up the same, as his ancestors theretofore had done, and his expectation that a considerable period might elapse before any adult person would become entitled to the full benefit of his estates. Whom did he intend to favour? For whom was this anxiety shown, if not for the son of one of his sisters? And yet, according to the proposition of the heiress-at-law, to which I am now adverting, such a son would be excluded from all possibility of benefit during that indefinite period of time. If, therefore, we are to seek an interpretation of this will in conformity with the declared intention of the testator, and to find in it a rational and consistent rather than an extraordinary and irrational object, no countenance can be given to this inter-
 * 104 pretation, suggested on * the part of the heiress-at-law, if any other interpretation can be reasonably put upon the words of the will.

But in truth the whole of the argument on her behalf proceeds

upon this fallacy, that the will contains powers and directions for management with a prohibition of, or a proviso suspending, beneficial enjoyment.

It was the evident purpose of this testator for a certain period of time — a period which, if it were to continue till an adult tenant in tail should become an absolute owner, might possibly be a long one — to clothe his trustees with large and extraordinary powers for the management of his estate. But those powers are perfectly consistent with its being the duty of the trustees to hand over and account for the surplus rents and profits to the persons indicated to take beneficially under the devises contained in the will. No doubt here the direction is distinct that, during the lives of the testator's sisters and the life of his uncle and the life of the survivor, the trustees are to have the management, but the testator also clearly explains what he means by the use of that expression. The trustees are to maintain the buildings, to alter the disposition of the buildings on the estate with the exception of the original hall, to pull down and build up, to cut timber, to hire the servants, to engage the game-keepers, to regulate, in point of fact, the dispositions of the whole of the estate ; but at the same time, after they have applied the rents and profits which are required for those purposes, the remainder of the rents and profits is left to follow the disposition made of the estate.

The distinction, again, between the power of management and the power to suspend the enjoyment is clearly indicated in various parts of the will. One portion has, *and very * 105 rightly, been insisted upon by the counsel for the appellant. I mean, those parts of the will in which the testator clearly contemplates a tenant for life being in the possession of the estate and cutting down timber under the control of the trustees, acting with the consent and the approbation of the trustees, — a state of things which contemplates the possibility of the continuance of the power of management consistently with the beneficial enjoyment of the possession of the property. There are other indications to the same effect in the will, particularly in the direction to take the name and arms ; where it is said that the husband of every female, either of the testator's own sisters or of the daughters of Lord De Lisle, shall take the name and arms within twelve months after the wife shall become entitled to the possession of the estates devised. But if the possibility of that right of posses-

sion be peremptorily and absolutely postponed until the death of the testator's sisters and the death of his uncle, it would follow that for a long period of time there would be no representative of the ownership, no person to keep up the name and family of the testator, and that the whole of the estate and the possession of the mansion-house, which he was anxious to keep in the line of his family, would pass away to a person not answering those conditions for (as I have already observed) a period of time of which it was impossible to ascertain the extent, depending as it does upon the death of the survivor of three persons. It cannot be supposed that that obligation to apply for the name and arms was to be postponed until after the death of the testator's sisters and uncle.

- The language of the will, again, with regard to the management, is clear in the direction that the trustees shall enter into possession and receive the rents during the lives of the testator's uncle and sisters and the survivor * of them, and during the minority of any person who at the death of the survivor may be entitled beneficially to the possession. During this time they are to receive the rents; and then the will goes on, "and shall and do keep up the mansion-house and all the gardens and pleasure-grounds, offices, and establishments belonging thereto, and manage my estates."

I cannot, therefore, hold that management includes not merely the receipt but also the withholding of the rents. That it does so, is the sum of the argument on the part of the heiress-at-law before me; that it includes not merely the receipt but the accumulation of the rents, is the sum of the argument of the representative of the survivor of the trustees. I think it includes neither, but simply means the superintendence and control over the estate itself, — a thing which is entirely consistent with a beneficial enjoyment and receipt of the rents by the persons taking under the devises.

My judgment, therefore, is, that immediately subject to the trusts of the term, the person entitled to the first vested estate for life, namely, the appellant, became entitled to the surplus rents of the whole of these estates not required for the exigencies declared of the term; and I think that the direction given to the trustees to manage the estates does not involve any suspension of the enjoyment of the estates themselves, or interfere in any respect with

the right of the devisees, save thus far, that the devisees might not be entitled to claim the possession of the estates.

A subordinate question has been argued in the interest of the heiress-at-law; namely, the right to the rents during the period of time allowed by the testator for * the arising of * 107 a contingent use in favour of any future child of his sisters.

With respect to this, it must be noticed, that the first vested estate of freehold under the dispositions made by this will is the estate vested in trustees during the lives of the testator's sisters to preserve contingent remainders to the issue of those sisters. That estate of freehold would not entitle the trustees to receive and withhold or suspend the enjoyment of the estates until the contingency should arise. Until the contingency happens, until the executory limitation takes effect, that is, until the use arises, the ownership of the estate runs in the channel provided by the will. It takes effect and vests subject to be divested, and immediately that the contingent use arises, it divests the estate out of the antecedent owner under the subsequent limitations; but it takes the estate and vests it in the person entitled without any power in that individual of reclaiming or recovering the rents of the estates which have been received in that intermediate time precisely in conformity with the intention and directions of the testator. If the testator intends that the limitations shall not take effect subject to the contingency, it is necessary for him to provide a power to accumulate and to withhold the enjoyment until the contingency shall arise. That power is not involved in the estate to the trustees to preserve, which merely supports and maintains the possibility of the contingent use coming into *esse*, and not being defeated by reason of the want of an estate of freehold to support it.

Still less can it be successfully argued, that during the period of time allowed for the occurrence of the contingency, there is no disposition of the estate. There is a disposition of the estate, which takes immediate effect, * namely, in the uses * 108 which are declared subject to the contingency; and accordingly the estate belongs to the person who has the first vested estates subject to be defeated and divested by that contingent use when it shall arise.

In my judgment, therefore, there is not any ground for a claim

on the part of the heiress-at-law to a portion of the rents of the estate during that period of time, namely, the period of eighteen years allowed for the birth of any child of the younger of the sisters.

The next question is, whether or not there is in this will a trust and direction for the accumulation of the rents during the lives of the testator's sisters.

It is said, and his Honor the Master of the Rolls has acceded to the argument, that there is ; and authority for the position is sought from the clause empowering the trustees of the term during the minority of persons for the time being absolutely or presumptively entitled, by virtue of the will, to an estate for life or in tail immediately expectant on the estate for the lives of the testator's sisters limited to trustees to preserve, but subject to the annuities under the will and other charges, to pay and apply during the lives of the testator's sisters a competent part of the surplus income for the maintenance and education, or otherwise for the benefit of the persons for the time being entitled thereto, the trustees accumulating and investing the surplus, and such accumulations to be (but subject to the satisfaction of debts and legacies) subject to the trusts of moneys to arise under exercises of the power of sale in the will. So, however, to construe this clause is to render it inconsistent with the subsequent clause, which declares

that the trusts for the management of the estates shall after
 * 109 the death of the * testator's uncle and sisters be suspended during the life of any adult tenant for life, — a clause on which reliance has been placed as well upon the part of the heiress-at-law as of the representative of the survivor of the trustees. For assuming the first mentioned clause to be in effect one for accumulation, it is so for accumulation during the lives of the sisters only ; but if the direction for management involves the direction to accumulate, the latter direction must be coequal in duration with the former, and the former extends to three lives. The two clauses therefore shed no light the one upon the other, and the first mentioned clause must be dealt with according to its plain grammatical meaning.

There is a direction in it, certainly, to accumulate, but what is directed to be accumulated, and for how long ? The period of time during which the accumulation is to continue is that period of time indicated in the commencement of the clause, which gram-

matically governs the whole of the rest of the directions. The directions are to continue during the period of time indicated for their existence, and that period of time is pointed out by these words in particular, "during the minority of any person for the time being absolutely or presumptively entitled by virtue of this my will." The direction to accumulate, therefore, is a direction which lasts only during the minority, and a direction which cannot arise until the event of the minority arises. The accumulation must last whilst there is a person an infant who is absolutely or presumptively entitled for life or in tail immediately expectant on the estate limited to the trustees to preserve during the lives of the sisters. That is a clear, definite, and express direction. It is certainly true that the latter part of the clause is governed by the introductory words of direction. The language is that the trustees shall "pay and apply during the lives of my sisters * a competent part of the surplus interest." If these words * 110 have any intelligible meaning, they must amount to this, that the direction to maintain during the minority is a direction intended to be applicable only to some minor absolutely or presumptively entitled, whilst the two sisters or one of them are or is still living, and then that the direction to maintain will cease, so far as this trust creates it, upon the death of the two sisters.

That is the literal meaning of the words, — certainly a singular direction. But it is difficult in a will, constructed as this appears to have been with imperfect information upon the subject of the law, to find a meaning in all cases consistent with the correct understanding of the law. I must, however, take the words, and if they are capable of an intelligible meaning, I must give them that intelligible meaning. And these words do admit of the interpretation which I have mentioned, and as so interpreted they amount to a provision for maintenance applicable to the case of a minority occurring before the death of the sisters, — as I have said, a singular direction, but an interpretation which satisfies the words and renders it unnecessary to strain the clause in order to give them another interpretation.

Again, assuming, for the sake of argument (for I cannot agree with it in fact), that the latter part of the clause we are considering can be taken as independent of the commencement, and a direction can be extracted for the application during the lives of the sisters of a competent part of the income in maintenance, and

that the words "accumulating the surplus," can be taken as if they came after the words "during the lives of my sisters," still such a construction would not lead to the conclusion that there was an absolute direction to accumulate the surplus during
 * 111 the lives of the sisters ; because the direction to * pay during the lives of the sisters is a direction to pay maintenance,—a direction which would cease with the infancy of the object. The thing to be accumulated is the surplus. The surplus of what? The surplus of that which remains after the maintenance; and therefore the surplus or thing directed to be accumulated will also cease with the infancy of the object.

In my judgment, therefore, these words cannot signify an absolute trust for the accumulation of the surplus rents, meaning by surplus, the surplus rents not required for the purposes of the term during the continuance of the lives of the sisters. The effect of that would be to suspend the beneficial enjoyment of this estate during the lives of the sisters, so as to deprive an eldest son of one of those sisters who has attained twenty-one from becoming the occupier of this residence and succeeding to the ownership and the enjoyment of the estate as long as his mother or his aunt was alive,—a conclusion at once unreasonable and at variance with the declared intention of the testator.

I think that the clause in question is limited to the period of time during which there shall be a minority, and that the accumulation is to last only during that minority, and comes into existence only in the event of there being a minority.

I have, lastly, to consider whether, consistently with this interpretation, the tenant for life, namely, the appellant, being entitled to the receipt of the surplus rents, is also entitled to the possession of the mansion-house,—that is to say, can the trustees withhold from the tenant for life the possession of the mansion, and let that mansion to another person?

* 112 * The tenant for life will be under the obligation, and, as she is married, her husband will be under the obligation, of assuming the name and arms; and inasmuch as I hold her entitled to the surplus rents, she will be entitled to the rent arising from the letting of the mansion. But it would be unreasonable to come to the conclusion that she is not to have the possession of the mansion, she undertaking to perform all those things which the trustees have a right to require under their powers of manage-

ment. It would be unreasonable to say that she shall not have that, and that she shall have, notwithstanding, the rents to be obtained from the letting of the mansion. When her husband shall have acquired the right to bear the name and arms of the testator, he will be entitled, I think plainly, in right of his wife upon the face of this will, to the possession of the mansion, subject to the control that I have already mentioned on the part of the trustees, and that that effect is so given to this will is a result which is in perfect conformity with the intention of the testator as declared in the outset.

The order, therefore, that I must make will be to reverse the order of his Honor the Master of the Rolls ; to declare that there is no intestacy, nor is any part of the rents and profits of the estates undisposed of ; to declare that the appellant, as being the person in whom the first estate of freehold was vested beneficially at the death of the testator, inasmuch as no child has been born since the death of the testator to either of his sisters, is entitled to the receipt of the surplus rents and profits of the estate not required for the purposes of the term from the time of the death of the testator ; and to declare also that, subject to the obligation of keeping down the annuities payable out of the rents and profits of the real estate and performing the directions and requisitions of the trustees, which they are warranted to make under * their powers of management, and subject to the further * 113 obligation on the part of the husband of the appellant of complying within one year from the 4th July, 1863, with the requirements of the will for the assumption of the name and arms of the testator, the appellant, the tenant for life, is entitled to the possession of the mansion-house, park, and other appurtenances, and to the receipt of the rents and profits of the real estate devised by the will of the testator, or the estates purchased under the directions therein contained, and to the income of the residuary personal estate of the testator for life, subject to the trusts of her marriage settlement. (a)

The reporters understand that an appeal to the House of Lords was presented by the Marquis and Marchioness of Casteja from so much of the Lord Chancellor's decision as held the appellant

(a) Reg. Lib. 1863, A. 2661.

entitled to the surplus rents and profits during the interval of suspense between the day of the testator's death and the expiration of eighteen years from the date of his will, within which children of the marchioness, to have taken at all under the testator's will, must have been born, — an interval in which the appellant's right was contingent merely, and that the appeal was compromised on terms favourable to the heiress-at-law.

1863. November 10, 11, 12. December 9, 16. Before the LORDS JUSTICES.

Property vested in the trustees of a building society was laid out according to a plan, and allotted or sold in lots to members or purchasers, who were aware of the existence of the plan before the trustees executed conveyances to them, and who entered in the respective conveyances to them into certain restrictive covenants with the trustees of the society, the necessity for the insertion of which was well known to every one having dealings with the society: one of such covenants in particular being to the effect that the restrictive covenants in question should not only enure to the benefit of the persons for the time being entitled under conveyances to be thereafter made by the covenantees, but that the covenantees should be deemed to be trustees of the covenants for the benefit of the persons for the time being claiming under any conveyances already made by the trustees of the society. A bill being filed by a purchaser from an allottee against another person standing, in respect of the society, in a similar position to himself, as the sole defendant thereto, and seeking to have the benefit of the restrictive covenants entered into by the defendant, and an injunction to restrain him from building in alleged contravention thereof, and a mandatory injunction to compel him to take down buildings already erected by him in alleged contravention thereof, and for damages: *Held*, that the trustees of the society were necessary parties to the suit, and, *semble*, that the other allottees and purchasers ought also to be represented in it.

Per the Lord Justice KNIGHT BRUCE.

1. Whether the body of restrictive covenants taken together was not of such a character as, independently of delay and of acquiescence, to exclude any remedy by injunction under them: *quære*.
2. It not being possible to sue the defendant at law on the restrictive covenants, it might be the duty of the Court, in the event of the plaintiff having lost his right to an injunction by reason of his delay in instituting the suit, to inquire what, if any, damages he had sustained by the defendant's acts in contravention of the covenants, and to provide for the payment of the amount of them, if any: *semble*.

Per the Lord Justice TURNER.

1. Whether the defendant ought to be bound by the general plan: *quære*.
2. The plaintiff had an equity against the defendant by reason of the particular restrictive covenant above specified, of which breaches of duty on the part of the trustees of the society would not deprive him.
3. That in the particular case the plaintiff had lost his right to an injunction by acquiescence; ¹ but, *semble*, that he might be entitled to damages under Sir HUGH CAIRNS'S Act, 21 & 22 Vict. c. 27.

THIS was an appeal by the defendant Samuel Lever from a decree of the Vice-Chancellor of the Duchy Court of Lancaster, the purport of which is stated below.

The case stated by the bill was in substance this: that a building society at Liverpool, established for enabling members to receive the amount or value of their shares *for *115 the purpose of purchasing or erecting dwelling-houses or land in the neighbourhood of that town had, sometime prior to the filing of the bill in the suit, purchased an estate in that neighbourhood, taken a conveyance of the estate to their trustees, Francis Malcolm, Matthew Rourke, and Roger Pierce, and laid it out in streets and divided it into plots according to a plan prepared under the direction of the committee of the society; that according to this plan several of the plots were to front the turnpike road leading from Liverpool to Prescott, and lots 3 to 72 were to front a street called Fairfield Street, and all the houses built on those plots were to have their fronts facing Fairfield Street; that members of the society and those purchasing from them, including the appellant, were (and the fact was not disputed) fully aware of the existence of the plan before any plot was conveyed to them by the trustees of the society, and they, including the defendant, took their conveyances subject thereto; that the plan was circulated amongst the members and allottees entitled to allotments of portions of the estate, and that a printed form of restrictions, to be inserted in the conveyances to the allottees and purchasers, specifying restrictions which were in substance, if not in terms, the same as those imposed by the covenants, to be presently stated, was also made public to all persons having transactions with the society as purchasers or allottees of land as well as to others; that the plaintiff William Eastwood, the younger,

¹ See Kerr Inj. 496, 497; Coles v. Sims, 5 De G., M. & G. 2, note (1), and cases cited; Graham v. Birkenhead, &c., Railway Co., 2 Mac. & G. 146, and cases cited in note (2).

had purchased the plots numbered 66, 67, 68, and 69 on the plan, from a member of the society who had contracted with the trustees for the purchase thereof, and that by a deed dated the 7th of March, 1860, these plots were conveyed by the trustees of the society under the direction of the vendor to the plaintiff William Eastwood, the elder (who was alleged to have advanced money to the plaintiff William Eastwood, the younger), to uses in

* 116 bar of * dower, the plaintiff William Eastwood, the elder,

for himself, his heirs, executors, and administrators, covenanting with the trustees, their heirs, and assigns as follows; viz., that not more than four dwelling-houses or dwelling-houses and shops and the outbuildings thereto, and no other buildings whatsoever, should be erected on the piece of land, and that the front of each house should stand back five yards from Fairfield Street; that the houses should be semi-detached in pairs and placed in the situations marked on the plan, except so far as that provision should be modified by the consent in writing of the covenantees or of their surveyor. Then there were provisions about the height of the dwelling-houses, and that no house was to be commenced until a ground-plan and elevation drawing thereof should have been submitted to and approved in writing by the covenantees or their surveyor; that the houses should be built in accordance with the elevation so submitted and approved; that the walls between the houses at the northern and southern extremities of the land and the houses on the land adjoining were to be party-walls; that the plaintiff William Eastwood, the elder, should fence in the land in front to Fairfield Street with iron palisades and a stone plinth, to the satisfaction of the surveyor for the time being of the covenantees, uniformly with the other houses in the same street; that the land should be fenced off from the adjoining land on the west, north, and south sides by substantial stone or brick walls, which were to be again party-walls, and the expenses to be paid in the manner therein mentioned; that the plaintiff William Eastwood, the elder, should pay half the expense of repairing those walls; that no building or erection on the land should be used as a pigsty, slaughter-house, or house for melting tallow, and that no noisy or noxious or offensive trade or business, or any business or occupation that should be a nuisance to

* 117 the owners or occupiers * of the adjacent premises or dwelling-houses thereon, should be carried on on the land;

and lastly, that the covenants on the part of the plaintiff William Eastwood, the elder, should not only enure to the benefit of the persons for the time being entitled under conveyances to be thereafter made by the covenantees, but that the covenantees should be deemed to be trustees of the covenants for the benefit of the persons for the time being claiming under any conveyances already made by the trustees of the society.

The bill stated that the plaintiff William Eastwood, the younger, relying on the understanding that all the other purchasers of plots of land forming the estate would build in accordance with the plan and restrictive covenants herein before mentioned, at his own expense, erected on lots 66 to 69 inclusive, detached or semi-detached dwelling-houses, in accordance with plans submitted to the surveyor of the society and approved of by him, and that those dwelling-houses were in every respect in compliance with the plans and covenants as to the mode of building as stipulated in the deed of conveyance to the plaintiff William Eastwood, the elder.

The bill then stated that the appellant had become an allottee or purchaser from an allottee or allottees of the society of the plots of land comprised in lots 26 to 36, both inclusive; that all those lots fronted to Fairfield Street, and were situate on the east side thereof, lots 30, 31, and 32 being directly opposite lots 66, 67, and 68 on the west side of the street, which had been conveyed for the benefit of the plaintiffs or one of them.

The bill then showed the acquisition by the appellant of lots 26 to 36, both inclusive, by various deeds of conveyance from various allottees, and alleged that all * the deeds of con- * 118veyance from the trustees to the different allottees respectively, and the respective deeds of conveyance to the appellant contained covenants in the words or to the purport or effect herein before set forth, and that the appellant was bound to perform the covenants contained in such deeds of conveyance.

The bill then stated (in its 10th paragraph, to which the Lord Justice KNIGHT BRUCE in his judgment referred) that the appellant had recently built on the plots of land comprised in lots 33, 34, 35, and 36, a large hotel facing the turnpike-road, and not to Fairfield Street, in contravention of the restrictive covenants entered into by him with the trustees of the society; and then that he was proceeding to erect on the plots of land comprised in lots 29, 30, 31, and 32, a stable, brick walls, and other buildings,

including a brick midden with a blank wall facing Fairfield Street for the reception of manure, contrary to the plan and restrictive covenants entered into by allottees or purchasers of plots of land from original allottees of the society. The bill then proceeded to charge in effect that the restrictive covenants were entered into for the protection of all persons who should become owners of lots, and that the appellant was throughout aware of their intention and effect and of the regulations and scheme of the society.

The bill then alleged that the appellant had transgressed the restrictions and covenants in his deeds of conveyance from the society (proceeding to state the different acts which he had not done); as, for example, that he had not fenced the plots of land comprised in lots 29 to 34, both inclusive, in front to Fairfield Street with iron palisades and a stone plinth uniform with the adjoining lots, but instead thereof had built on part of the
*119 land, and without having had the sanction of the *surveyor or the trustees of the society, a brick wall of two feet six inches in height or thereabouts, extending from sixty-two feet from the north end of Fairfield Street and to the front thereof for seventeen yards or thereabouts; that he had on the plot of land numbered 31 commenced and was proceeding to erect a brick wall of the height of eleven feet, which was arched over and leading to the back of the hotel and to the stables which he had caused to be erected and built on the plots of land numbered 29 and 30, directly opposite the front windows of the dwelling-house which the plaintiff William Eastwood, the younger, had built on the plot of land numbered 66 on the plan, and that between the stable and the front of the land facing the street, where there ought to be a stone plinth and iron palisades, and within five yards of the front of Fairfield Street, the appellant was proceeding to erect a large brick building with a blank wall facing Fairfield Street, the height of which was to be twelve feet, to be used as a midden for manure; and also that in front to the street the appellant had erected a yard wall two feet four inches in width and eight feet high, and had placed and fixed stone gate posts of the height of six feet on the plot of land numbered 30, from which the appellant was about to place wooden doors leading to and abutting on Fairfield Street aforesaid into the yard adjoining the stable and midden.

Then the bill alleged that in consequence of that the tenants and occupiers of the plaintiffs' dwelling-houses in Fairfield Street had complained, and that if the appellant's proceedings went on the plaintiffs' property would be considerably depreciated in value.

The bill prayed (1), that the plaintiffs might have the benefit of the covenants entered into by the appellant * with * 120 the trustees or their allottees or purchasers; (2), that the appellant might be restrained by injunction from proceeding with, or permitting to continue and remain, the erections and buildings on the plots of land numbered 26 to 36, both inclusive, on the plan, fronting Fairfield Street, or on any portion thereof, so far as the same erections and buildings were in contravention of the restrictions contained in the plan and the covenants contained in the deed of conveyance to the plaintiffs, or the restrictions and covenants contained in the deed or deeds of conveyance to the appellant; and that the appellant might be ordered to pull down the brick midden erected on plots numbered 29 and 30, and all other erections and buildings erected by him on that or any other plot of land on the estate which were not in compliance with the plan and restrictive covenants contained in the deed or deeds of conveyance or any of them, and that none of such buildings might be permitted to remain in future; and also (3), that the appellant might make satisfaction, in damages to be assessed by the Court, for all damages the plaintiffs, or either of them, had sustained, or might sustain, in consequence of the appellant having erected the buildings and walls or other erections on the plots of land numbered 26 to 36, both inclusive, or any of them, or on any portion thereof, and for all damage occasioned by his misfeasance or neglect.

Immediately upon the filing of the bill application was made to the Vice-Chancellor for an injunction according to the prayer; but his Honor directed the application to stand over till the hearing of the cause. Upon the cause being heard his Honor made a decree which, so far as it is material, was to the following effect; viz., the Court declared that, having regard * to the * 121 covenants and restrictions in the bill mentioned, the only buildings proper to be erected upon the lands forming lots 29, 30, and 31 of the same estate were dwelling-houses or dwelling-houses and shops, and the outbuildings thereto, of which the ground-plans and elevations had been previously submitted to and

approved of by the covenantees of the society or their surveyor; and further, that any houses so to be erected on such lots ought to be semi-detached in pairs and placed in the situations marked on the plan or plans referred to in the conveyance or conveyances of such lots respectively, except so far, if at all, as such provision might have been or might be modified by the consent in writing of the covenantees or of their surveyor; that all such houses ought to be built in all respects in accordance with the elevation drawing thereof submitted to and approved of by the covenantees or their surveyor as aforesaid, and that the appellant was not entitled to erect and was not entitled to maintain that portion of the buildings erected by him on part of the estate which extended at right angles from the front of the stables erected by the defendant as aforesaid up to Fairfield Street, nor a certain transverse wall; but that declaration was not to affect a certain outside wall dividing the defendant's stable-yard from his garden, and in the decree particularly mentioned.

The decree then proceeded to order the appellant to pull down and remove the buildings complained of except the outside wall, and it declared that the stables were to be used only as general outbuildings to any dwelling-houses, or dwelling-houses and shops which might be erected on lots 29, 30, and 31 in accordance with the plan and elevation aforesaid, and it restrained the appellant from putting them to any other use.

* 122 * *The Attorney-General* (Sir R. PALMER), *Mr. E. R. Turner*, and *Mr. Bardswell* appeared for the appellant, and *Mr. Amphlett* and *Mr. Little* for the plaintiffs.

For the purposes of the present report the nature of the arguments sufficiently appear from the judgment of the Lord Justice TURNER.

The authorities referred to were the following:—

Roper v. Williams, (a) *The Duke of Bedford v. The Trustees of the British Museum*, (b) *Tulk v. Moxhay*, (c) *Child v. Douglas*, (d) *Whatman v. Gibson*, (e) *Squire v. Campbell*, (g) *Patching v. Dubbins*. (h)

Judgment reserved.

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|-------------------------------------|----------------------|----------------|
| (a) T. & R. 18. | (b) 2 M. & K. 552. | (c) 2 Ph. 774. |
| (d) Kay, 560; 5 De G., M. & G. 739. | | |
| (e) 9 Sim. 196. | (g) 1 My. & Cr. 459. | (h) Kay, 1. |

December 9.

THE LORD JUSTICE KNIGHT BRUCE. — The main question in this cause is, whether on the ground of contract, not on the ground of nuisance or alleged or apprehended nuisance, — but, I repeat, on the ground merely of contract, — the plaintiffs are entitled to the interference of this Court against the defendant for the purpose of restraining him from building on his own land unless in a particular mode, — from using his own land for particular objects or in a particular manner.

There is also a question whether the plaintiffs are entitled to recover in the suit damages against the defendant * for * 123 having broken, as he is alleged to have broken, the contract under which the injunction is sought.

The alleged contract, contended to bind the defendant, consists of covenants into which the defendant or his predecessors in title entered with certain trustees, namely, three gentlemen named Malcolm, Rourke, and Pierce, of whom two at least, I believe, are living in England, but all are absent from this record.

The learned Vice-Chancellor of the county palatine of Lancaster has pronounced a decree to some extent in favour of the plaintiffs, — granting an injunction, but not giving damages. With deference to his Honor, however, I acknowledge it to be my impression that at the hearing of the cause one of two courses should have been taken; namely, either the cause should have been directed to stand over for the purpose of adding Mr. Malcolm, Mr. Rourke, and Mr. Pierce, the three covenantees or the survivors of them, as parties, plaintiffs, or defendants, and also making the suit one capable of binding others whom in its present state it does not affect; or the bill should have been dismissed for want of equity.

Not any sufficient ground or reason, as I apprehend, is alleged by the bill or apparent on it, as shown by the evidence, for asking relief on a record so constituted as the present record was at the hearing, and still is, in point of parties, even if there were no other objection in the plaintiffs' way.

I apprehend that, as the record stands, the trustees are not, nor will be, bound by any decree or order made or to be made in the suit. And as to persons who, * besides the plaintiffs * 124 and defendant, are interested in the performance of the covenants, — I mean purchasers of other lots of the land originally sold or those who represent them, — they also are not before the

Court, either by means of the bill having been filed on the actual plaintiffs' behalf and theirs or otherwise.

The decree ought, I apprehend, to be discharged.

Should liberty, however, be given to add parties by amendment or by supplement? I apprehend so, although at present the materials before us appear to me to show so much delay in instituting the suit and works of such a nature done by the defendant before its commencement as to render the interference of this Court against him by way of injunction at the plaintiffs' suit not properly possible, even if the body of covenants taken together is not such in character as, independently of delay and of acquiescence, to exclude any remedy by injunction under them. For the 10th paragraph of this bill is thus — [his Lordship read the paragraph in question and proceeded thus] : —

The hotel could not have been built in a very short time. The building seems to have been in course of construction for some months before the suit, and must have been deemed likely to require appendages. It appears to me, however, at present, that the defendant cannot be sued at law on the covenants upon which the bill proceeds, and that it may be the duty of this Court to inquire what, if any, damages the plaintiffs have sustained by the defendant's acts in contravention of the covenants, and to provide for the payment of the amount of them, if any.

The case should, therefore, I conceive, go back to the
 * 125 * county palatine, and if the suit is to proceed the other purchasers, or those holding their rights, should, I think, as well as the surviving trustees, be in some manner represented on the record.

The Lord Justice TURNER, after stating the facts of the case to the effect of the statement of them above given, proceeded as follows : —

Several points have been insisted upon on the part of the defendant in support of this appeal. First, that the defendant is not bound by the general plan mentioned in the bill, and can be affected only by the covenants contained in the deeds of conveyance, and that the plaintiffs are not entitled to sue the defendant upon these covenants. Secondly, that assuming the defendant to be bound by the general plan, that plan has been so far deviated

from with the sanction of the trustees that it cannot now be enforced against the defendant. Thirdly, that the plaintiffs have not themselves observed the covenants which they are seeking to enforce. Fourthly, that the plaintiffs have so far acquiesced in the buildings and works complained of by the bill that they have disentitled themselves to any relief in equity; and fifthly, that the suit was defective for want of parties.

As to the first of these points, I am not satisfied, having regard to the case of *Squire v. Campbell*, (a) so much relied upon in the argument, that the defendant ought to be held bound by the general plan; but without reference to the question whether he is so bound or not, I think that the plaintiffs have in this case an equity against him by force of the covenant entered into with the * trustees, and of which he had notice, that the covenants * 126 in the deeds of conveyance should be held by the trustees for the benefit of all the allottees and purchasers. And as to the second point, I think that the covenant last referred to furnishes an answer to this point also. Breaches of duty on the part of the trustees could not, as I apprehend, displace the equity created in favour of the plaintiffs by force of this covenant. The authorities on which the defendant relied as to this point do not, I think, apply to such a case as the present. As to the third point, I do not think that the defendant has established any such case of breach of covenant on the part of the plaintiffs as can disentitle them to enforce the covenants on his part, whatever other remedy he may be entitled to in that respect.

The case, therefore, so far as the merits are concerned, seems to me to rest upon the point of acquiescence.

It is admitted by the bill that the building adapted for an hotel was completely finished long before this bill was filed, and we cannot, I think, impute to the plaintiffs ignorance that such a building would almost of necessity require a stable to be attached to it. The evidence shows that the stable in question was also erected before the filing of this bill, and that the plaintiffs saw it from day to day in the course of its being erected. They allowed it to proceed, suffered the defendant to expend money upon it, and made no protest against it. It is said, indeed, that they had told the defendant that they should stand upon their strict rights; but

(a) 1 My. & Cr. 459.

this was before the stable was commenced, and cannot justify the plaintiffs, if they conceived that they had the rights they insist upon (and there is no allegation in the bill that they were ignorant of their rights), for having slept upon them. Under these

* 127 circumstances, with all respect to * the learned Vice-Chancellor, I cannot think that the injunction as to the stables ought to have been granted.

It is said, however, that whatever degree of acquiescence there may have been as to the stables, there has been none as to the wall and the erections between the stables and the street complained of by this bill. I do not find, however, that the bill complains of these works as they were ultimately finished. What is complained of by the bill is, that it was intended to erect a midden; but although this may originally have been intended, — and I am by no means satisfied that it was not, — the evidence seems to me to prove clearly that this intention had been abandoned before this bill was filed. Unless, therefore, the plaintiffs were entitled to insist that nothing whatever should be built between the stables and the street, there was not, as it seems to me, at the time when this bill was filed, any ground to call upon the Court for its interference as to these erections. They cannot, I think, be considered otherwise than as incidents to the stable, the completion of a plan already begun and in part finished; and the plaintiffs having debarred themselves by acquiescence from any right to call for the interference of the Court by way of injunction as to the principal work, cannot, I think, be entitled to claim such interference as to its accessories. The wall of which we are now speaking is in fact one of the boundary walls of the stable yard, and there is no complaint by the bill, nor do I see any reasonable ground on which complaint could have been made, of the hen-house connected with it. These observations apply also to the other wall complained of by this bill. It is in fact no more than a supporting wall to the wall forming the opposite boundary of the stable yard. Upon the ground of acquiescence, therefore, again speaking with all possible respect

* 128 to the opinion of the Vice-Chancellor, my * opinion is, that this decree cannot be maintained as to these erections.

But although the plaintiffs are not, as I think, for the reasons above stated, entitled to the relief by way of injunction sought by this bill, it does not, I think, follow that they may not be entitled

to damages for such injury (if any) as may have been done to their property by the defendant having built otherwise than in conformity with the covenant. Sir HUGH CAIRNS's Act, 21 & 22 Vict. c. 27, has, as I read it, empowered Courts of Equity to give damages in such cases.¹ It is not, as I think, confined to cases in which the plaintiffs could recover damages at law ;² and I think, therefore, the plaintiffs, bringing proper parties before the Court, are entitled, if they think fit, to prosecute the suit in that respect. I am satisfied, however, that for this purpose the trustees, and possibly other persons, ought to be made parties to the suit. If, therefore, the plaintiffs desire to go on with the suit with a view to recovering damages, I think the proper order to be made upon this appeal will be, that the cause stand over, with liberty to amend by adding parties ; but if the plaintiffs are satisfied to let the matter rest as to damages, I think the bill should be dismissed without costs.

December 16.

The plaintiffs electing to prosecute the suit with a view of recovering damages, it was remitted to the Court below, with leave to amend the bill within a fortnight by making it one by the plaintiffs on behalf of themselves and all other persons interested under the restrictive covenants as plaintiffs, and by adding the trustees as defendants, and with certain directions as to the return of costs paid by the defendant to the plaintiffs.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1080, 1081, and cases in notes.

² See Kerr Inj. 223, 224.

and not according to the principle of individuals. And, in my judgment, as I have said, the words *per stirpes* refer to the descendants; the expression then giving the rule of selection according to the principle of the stocks to be found amongst those descendants.

But stocks of descendants, as compared with individuals, may be few; for example, there may be a grandson of a brother or sister who himself has children or grandchildren. Persons in these last mentioned relations will be included in the word "descendants;" yet the father or grandfather, as the case may be, is to be preferred as the legatee, inasmuch as the legacy is given to the *stirps*, and not to the individuals. Nor does the word "respectively," in the language of the gift, alter this construction,

* 132 * although I was pressed with an argument to the contrary; for the word merely shows that all the descendants are to be taken, and then arranged under their respective stocks. The word is properly used as referring the descendants to the stocks whence they spring.

If, therefore, upon the true construction of this will, the gift is to the *stirpes* or families of all the descendants who were alive at the death of the testator, being descendants of such of the brothers and sisters of the testator's grandfather as had died leaving issue, and if it is a gift to *stirpes* and not to individuals, the only remaining inquiry is, how many separate and distinct families there are among the whole body of descendants; and that being answered, the descendants respectively must be arranged amongst the families whence they sprang, and then the head of each family must be taken as being the *stirps*, that is, the root or stock, and as entitled as the legatee. In other words, the testator's words import a direction that this fund shall be divided amongst the families of descendants of such of the brothers and sisters of the testator's grandfather as may have died leaving lawful issue, into which these descendants admit of being divided and distributed at the time of the testator's death. The words "equal shares" only imply how they are to take: viz., that each *stirps* shall have an equal share with every other *stirps*, and do not affect the rule of ascertainment.

In fact the word *stirps* is legitimately capable of further extension. Suppose at the death of the testator there had been not only some grandchildren of the two sisters, but also great grand-

children of one of the sisters, being children of grandchildren who had died before the testator, these grandchildren would have taken as representing * families or *stirpes*. Applying * 133 the same rule to the great-grandchildren, there might be children of grandchildren taking *per stirpes* to the exclusion of their own children.

This rule runs throughout the whole ; viz., that you must take the father or parent as the person who is to take the share as representing and embodying in himself all those descendants who are his own immediate issue.

If I were to hold, with the Master of the Rolls, that the fund must be divided into as many shares as there were brothers and sisters of the grandfather who had left issue living at the testator's death, I should be doing, in my judgment, violence to the testator's language and intention. The result of so holding would, in the present instance, have been that the fund would be divisible into two parts, — a result which I think would have been effected by other words, if such had been in fact the testator's intention.

Differing, therefore, in my conclusion in this respect from the Master of the Rolls, I must reverse his Honor's decision, and declare that the words *per stirpes* and not *per capita* used by the testator are applicable to the descendants, who are to be classified *secundum stirpes*, or according to their families, and that the property in question is to be divided into as many shares as there are *stirpes* or families, each *stirps* or family taking an equal share.

In order to give effect to this declaration, the descendants should be classified according to *stirpes*, and there should be a division into families according to the actual * facts, and * 134 for the purpose of ascertaining the various *stirpes* a direction for proper inquiries.

The above judgment of the Lord Chancellor was delivered at the close of the arguments, and was not written, as might seem to be implied by the remarks of the Master of the Rolls in the subsequent case of *Gibson v. Fisher*. (a)

(a) L. R. 5 Eq. 51, 53.

In the Matter of ISAAC WOOD, a Lunatic, and BANNER v.
ENGLAND.

1863. December 4, 11, 18. Before the LORDS JUSTICES.

According to the established practice in lunacy, no person except the parties and those claiming under them may as of right inspect the proceedings; other persons claiming the right so to do must make a case for the purpose. Circumstances under which liberty was given to plaintiffs in a suit for the administration of the intestate lunatic's personal estate to do so.

THIS was a petition presented by Edward Banner and Sarah Caroline his wife, the plaintiffs in the above-mentioned cause, seeking for the petitioners liberty to inspect all documents in the matter of the lunacy which were in the custody of the master, registrar, or other officers in lunacy, and to take copies and extracts therefrom as they might be advised at their own expense: and an order on the proper officers to attend with such documents upon any examination of witnesses at the hearing of the cause as the petitioners might require.

The cause was one for the administration of the personal estate of the lunatic, who had been so found by inquisition and had died intestate, on the footing that Mrs. Banner was the legal personal representative of one of the next of kin of the lunatic living at his death, and as such entitled to share in his personal estate.

* 135 * The defendants in the cause were John England, the surviving executor of the will of Thomas Coupland, deceased, who, as administrator of the lunatic's personal estate and effects, was alleged by the plaintiffs to have received largely in respect thereof; Francis Blake, the administrator *de bonis non* of the lunatic's personal estate and effects; and William Newton and Hawksley Hall, the trustees of Thomas Coupland's will.

The bill charged that by collusion among the persons appearing in the lunacy orders had been made under that jurisdiction which enabled Thomas Coupland to obtain the grant of the letters of administration of the lunatic's personal estate.

The plaintiffs also controverted the title of Thomas Coupland as one of the lunatic's next of kin as had been found in the

lunacy, and charged that the truth of their statements would appear by the proceedings in the lunacy.

The answers of the defendants denied the plaintiffs' title, and set up acquiescence on their part.

Replication had been filed in the suit, but the time for closing the evidence was still running.

Mr. Greene and *Mr. F. H. Bowring* appeared for the petitioners, and

Mr. Schomberg, *Mr. E. Macnaghten*, and *Mr. Osborne Morgan*, for the several defendants, on whose behalf they contended that, regard being had to the statements in their answers, and in the absence of all evidence of the truth of the allegations in the bill, the Court should not accede to the prayer of the petition.

Administration * of the intestate's personal estate and * 136 effects had been duly issued to Thomas Coupland, and the custody of documents by the Master in Lunacy was equivalent to the custody by him and those representing him. And as, had the documents been in such latter custody, the petitioners could not have had such liberty as they now sought, so neither ought they to have it under the actual circumstances of the case; more especially when they had slept on their rights, if any, as the defendants alleged them to have done.

They referred to *Bolton v. Corporation of Liverpool*, (a) *Re Silcox's Lunacy*, (b) *Re Sartoris's Lunacy*. (c)

Mr. Greene, in reply, referred to *Re Fitzgerald*, (d) *Ex parte Clarke*. (e)

The Lords Justices ordered the petition to stand over in order that the petitioners might verify by affidavit their title to the relief sought by their bill.

December 18.

This having been now done, the Lords Justices, after remarking upon the importance of the application, said that in the interval

(a) 1 Myl. & K. 88.

(b) 1 N. R. 4.

(c) 1 N. R. 4.

(d) 2 Sch. & Lef. 432.

(e) Jac. 589.

which had elapsed since the petition was first brought on they had caused inquiries to be made as to the practice in such matters in lunacy, the result being that it appeared that though prior to 1825 no one had been debarred from inspecting proceedings in lunacy, the practice subsequently to that date had been to consider such proceedings as concerning only the parties and those * 137 claiming under them. To entitle any other * persons to such inspection, a case must be made out to the satisfaction of the Court. In their Lordships' judgment such a case had been now made on the present occasion by the petitioners' affidavit. The prayer of the petition would accordingly be granted, and the costs of the application would be made costs in the cause.

THE LEATHER CLOTH COMPANY, LIMITED v. THE
AMERICAN LEATHER CLOTH COMPANY, LIMITED.

1863. December 3, 4, 5, 21. Before the Lord Chancellor Lord WESTBURY.

The jurisdiction of the Court of Chancery in the protection given to trade-marks rests upon property, and the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected.¹

Property in a trade-mark is the right to an exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity.²

Consideration of the question, how far the right to use a trade-mark admits of being sold or transferred.

Where the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark or in the business

¹ See *Edelsten v. Edelsten*, 1 De G., J. & S. 185; *Burgess v. Burgess*, 3 De G., M. & G. 896 and note (1), and cases cited; *Rodgers v. Nowill*, 3 De G., M. & G. 618, note (1); *Farina v. Silverlock*, 6 De G., M. & G. 214; *Taylor v. Carpenter*, 3 Story, 458; *Seixo v. Provezende*, L. R. 1 Ch. Ap. 192; *Amoskeag Manuf. Co. v. Garner*, 55 Barb. 151; *Congress Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291; *Stonebraker v. Stonebraker*, 33 Md. 252; 10 Am. Law Reg. (N. S.) 543; *Ford v. Foster*, L. R. 7 Ch. Ap. 611; *Canal Co. v. Clark*, 13 Wallace, 311; *Gillott v. Esterbrook*, 48 N. Y. 375; 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649; 1 Joyce Inj. 311 *et seq.*; Kerr Inj. 474 *et seq.*

² See *Candee v. Deere*, 54 Ill. 439.

connected with it be himself guilty of any false or misleading representation.¹

Consideration of what constitutes a material false representation.

It is not a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood in his trade-mark, because it may be so gross and palpable as that no one is likely to be deceived by it.

THIS was an appeal by the defendants from a decree made by the Vice-Chancellor WOOD upon the hearing of the cause, whereby his Honor granted, with costs, a perpetual injunction, restraining them from selling or exposing for sale or procuring to be sold any leather cloth or any fabric or article similar thereto having affixed thereon such stamp or trade-mark with the name of L. R. & C. P. Crockett, or the name of Crockett & Co., introduced thereon in such manner as by colourable imitation, or otherwise, to represent the fabric or article manufactured or sold by the appellants as being the same fabric or article as that manufactured and sold by the respondents, the plaintiffs in the suit, * or as * 138 being the fabric or article known as Crockett's leather cloth.

The case in the Court below is reported in the first volume of Messrs. Hemming and Miller's Reports, (a) where the facts are fully stated. For the purposes, however, of the present report, they sufficiently appear from the Lord Chancellor's judgment, as does also the scope of the arguments upon which that judgment ultimately turned.

Sir Hugh Cairns and *Mr. Dickinson* appeared for the respondents, and

Mr. Rolt and *Mr. Fischer*, for the appellants.

The authorities referred to were:—

On the part of the respondents, *Croft v. Day*, (b) *Churton v. Douglas*, (c) *Hall v. Barrows*, (d) *Millington v. Fox*, (e) *Sykes v. Sykes*, (g) *Knott v. Morgan*. (h)

(a) Page 271.

(b) 7 Beav. 84.

(c) Johns. 174, 189.

(d) 32 L. J. (N. S.) Ch. 548; S. C. on appeal, *infra*, p. 150.

(e) 3 My. & Cr. 338.

(g) 3 B. & C. 541.

(h) 2 Keen, 213.

¹ See *Palmer v. Harris*, 60 Penn. St. 156; *Kerr Inj.* 480, 481, 482; *Ford v. Foster*, L. R. 7 Ch. Ap. 611; 2 Dan. Ch. Pr. (4th Am. ed.) 1649; *Marshall v. Ross*, L. R. 8 Eq. 651.

On the part of the appellants, *Perry v. Truefitt*, (a) *Pidding v. How*, (b) *Crawshay v. Thompson*, (c) Stat. 18 & 19 Vict. c. 133, §§ 4, 5.

During the argument reference was made by the Lord Chancellor to an unreported case of *James v. Newbery*, (d) and also to the positions laid down in an American case of *Partridge v. Menck*, (e) to the effect that where a * person manufactured and sold an article under the name of the original manufacturer, although he might have purchased of him the secret of his manner of preparing the article and also the right to use his name, he was not entitled to be protected; and, further, that the privilege of deceiving the public for their own benefit was not a legitimate subject of commerce, and that therefore it made no difference that the complainant had purchased the right to use the name of the first proprietor; and that a party asking equity must come with clean hands.

At the conclusion of the arguments, his Lordship reserved his judgment.

December 21.

THE LORD CHANCELLOR. — Upon a review of the numerous cases which have been decided in this Court on the subject of trade-marks, there appears to be some uncertainty and want of precision in the language of different Judges as to the ground on which a Court of Equity interferes to protect the enjoyment of a trade-mark, and also on the question whether the right to use a trade-mark admits of being sold and transferred by one man to another.

At law, the remedy for the piracy of a trade-mark is by an action on the case in the nature of a writ of deceit. This remedy is founded on fraud, and originally it seems that an action was given not only to the trader whose mark had been pirated, but also to the buyer in the market, if he had been induced by the fraud to buy goods of an inferior quality. In equity, the right to give relief to the trader whose trade has been injured by the * 140 piracy * appears to have been originally assumed by reason of the inadequacy of the remedy at law, and the necessity

(a) 6 Beav. 66.

(c) 4 Man. & Gr. 357.

(b) 8 Sim. 477.

(d) See *Newbery v. James*, 2 Meriv. 446. .

(e) *Law's Digest of American Cases relating to Patents for Inventions and Copyrights*, New York, 1862, p. 688; S. C. How. App. Cases, 559, 561; 2 Sandf. Ch. 622; 2 Barb. Ch. 101.

of protecting property of this description by injunction. But although the jurisdiction is now well settled, there is still current in several recent cases language which seems to me to give an inaccurate statement of the true ground on which it rests. In *Croft v. Day* (a) and *Perry v. Truefitt*, (b) the late Lord LANGDALE is reported to have used words which place the jurisdiction of this Court to grant relief in cases of the piracy of trade-marks entirely on the ground of the fraud that is committed when one man sells his own goods as the goods of another. The words of the learned Judge are, "I own it does not seem to me that a man can acquire a property merely in a name or mark;" and in like manner the learned Vice-Chancellor, whose decision I am now reviewing, is reported to have said, "All these cases of trade-mark turn not upon a question of property, but upon this, whether the act of the defendant is such as to hold out his goods as the goods of the plaintiff." (c) But with great respect this is hardly an accurate statement; for, first, the goods of one man may be sold as the goods of another without giving to that other person a right to complain, unless he sustains, or is likely to sustain, from the wrongful act some pecuniary loss or damage (thus in the case of *Clark v. Freeman*, (d) an eminent physician, Sir James Clark, applied for an injunction to restrain a chemist from publishing and selling a quack medicine, under the name of Sir James Clark's pills; but the Court refused to interfere, because it did not appear that Sir James sustained any pecuniary injury); and secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised by the defendant * at all. The Court will grant relief, although * 141 the defendant had no intention of selling his own goods as the goods of the plaintiff, or of practising any fraud either on the plaintiff or the public.

If the defendant adopts a mark in ignorance of the plaintiff's exclusive right to it, and without knowing that the symbols or words so adopted and used are already current as a trade-mark in the market, his acts, though innocently done, will be a sufficient ground for the interference of this Court.¹

This is plain from the decision of Lord COTTENHAM in the case

(a) 7 Beav. 88.

(c) 1 H. & M. 287.

(b) 6 Beav. 73.

(d) 11 Beav. 112.

¹ See *Stonebraker v. Stonebraker*, 33 Md. 252.

of *Millington v. Fox*, (a) to which I entirely assent, and from the learned Vice-Chancellor's own opinion in the case of *Welch v. Knott*. (b)

Imposition on the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord THURLOW in *Webster v. Webster*, (c) "The fraud upon the public is no ground for the plaintiff's coming into this Court." It is indeed true that, unless the mark used by the defendant be applied by him to the same kind of goods as the goods of the plaintiff, and be in itself such, that it may be, and is, mistaken in the market for the trade-mark of the plaintiff, the Court will not interfere, because there is no invasion of the plaintiff's right; and thus the mistake of buyers in the market under which they in fact take the defendant's goods as the goods of the plaintiff, that is to say, imposition on the public, becomes the test of the property in the trade-mark having been invaded and injured, and not the ground on which the Court rests its jurisdiction.

* 142 * The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade-mark which such other person has an exclusive right to use in connection with the sale of some commodity; and if the plaintiff has an exclusive right so to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of the patent. I cannot therefore assent to the *dictum* that there is no property in a trade-mark.¹

It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them; but the word "trade-mark" is the designation of these marks or symbols as and when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore would seem to be, that the jurisdiction of the Court in the protection given to trade-marks rests upon property, and that the Court

(a) 3 My. & Cr. 338.

(c) 3 Swanst. 490 n.

(b) 4 K. & J. 747.

¹ See *Stonebraker v. Stonebraker*, 33 Md. 252; 10 Am. Law Reg. (N. S.) 543.

interferes by injunction, because that is the only mode by which property of this description can be effectually protected.

The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark, as in the case of the violation of any other right of property. But when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any * material false statement * 143 in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a Court of Equity.

The question then arises, what amounts to a material false representation? Suppose a partnership to have been formed a century ago under a style or firm composed of the names of the then partners, and that the partnership has been continued by the admission of new partners in an unbroken series of successive partnerships, trading under the same original style, although the names of the present partners are wholly different from those in the original firm; is it an imposition on the public that such partners should continue to use the style or firm of the original partnership? This question must be answered, without any doubt, in the negative; for it is competent by the law of England to a partnership to adopt any style or firm which does not involve a claim to incorporation or the assumption of what belongs to others, and the practice of the trading community in this respect is so common and general that no misleading of the public can result from it.

But suppose an individual or a firm to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such person or firm, and that the name has gained currency and credit in the market (there being no secret process or invention); could such person or firm, on ceasing to carry on business, sell and assign the right to use such name and mark to another firm carrying on the same business in a different place? Suppose a firm of A. B. & Co. to have been clothiers in Wiltshire for fifty years, and that broadcloth marked A. B. & Co., makers, Wilts, has obtained a

great reputation in the market, and that A. B. & Co., on
* 144 discontinuing * business, sell and transfer the right to use their name and mark to a firm of C. D. & Co., who are clothiers in Yorkshire; would the latter be protected by a Court of Equity in their claim to an exclusive right to use the name and mark of A. B. & Co.? I am of opinion that no such protection ought to be given. It is true that a name or the style of a firm may by long usage become a mere trade-mark, and cease to convey any representation as to the fact of the person who makes, or the place of manufacture; but where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion, which is false, I think no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained.

To sell an article stamped with a false statement is, *pro tanto*, an imposition on the public, and therefore, in the case supposed, the plaintiff and the defendant would be both in *pari delicto*. This is consistent with many decided cases. Further, property in a trade-mark is, as has been already observed, the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity. Consequently, the use of the same mark in connection with a different article is not an infringement of such right of property.

If, therefore, the trade-mark includes in itself a clear and definite description of the commodity to which it is affixed, it is not pirated by the use of a mark, which, although in other respects similar, does not contain or give the same description, and which is impressed on an article that is not of the nature or quality so described.

* 145 These conclusions seem to follow immediately from * the very principle to which a plaintiff seeking protection for a trade-mark appeals. He desires to restrain the defendant from selling his own goods as the goods of another person; but if, by the use of the trade-mark in question, the plaintiff himself is representing and selling his goods as the goods of another, or if his trade-mark gives a false description of the article, he is violating the rule on which he seeks relief against the defendant.

These observations seem to apply to the case now to be decided. The plaintiffs are an English company, formed in 1857, with limited liability for the purpose of making and selling an article called

leather cloth. They bought the business from an American company, which was formed for the purpose of carrying on this manufacture at New Jersey, in the United States of America, and at West Ham, in the County of Essex. The name of that company was "The Crockett International Leather Cloth Company." The original inventors and manufacturers of this article called leather cloth were a firm of Crockett & Co. in the United States, who, on the formation of the international company, ceased to carry on a separate business, and became shareholders in the company, but have since resumed business, and are now manufacturers of leather cloth in the United States. The international company by its agents obtained, in the month of January, 1856, an English patent for tanning the leather cloth, and having done so they devised an elaborate label to be attached to the goods manufactured by them, which, being in a circular form, had its circumference formed of the words "Crockett International Leather Cloth Company, Newark," with the initials "N. J. U. S. A.," meaning New Jersey, United States of America, and also the words "West Ham, Essex, England." These words and letters form the periphery or outer rim of the circular label. Within * this circle at the * 146 top is the word "Excelsior," below which is an eagle with expanded wings, and beneath the eagle are printed these words: "Crocketts & Co. Tanned Leather Cloth. Patented Jany. 24, 1856. J. R. & C. P. Crockett, Manufacturers." The International Leather Cloth Company carried on business as leather cloth manufacturers, both in the United States and in England, until May, 1857. They used the stamp or label which has been described as a trade-mark, affixing it to the goods they manufactured. In May, 1857, the plaintiffs' company was incorporated, and the international company sold and assigned to the plaintiffs the business carried on by them at West Ham, together with the English letters-patent, and full power and authority to use all and singular the trade-marks that had been used by the international company in their business in England. From the time of this sale the plaintiffs have carried on, and now carry on, at a manufactory at West Ham, the manufacture of leather cloth according to the process originally introduced by Messrs. Crockett & Co., and they have constantly used the label which has been described, stamping it on their goods of the first quality.

In August, 1861, the defendants were incorporated for the purpose of carrying on the manufacture and sale of leather cloth.

They have used as a trade-mark on goods made by them of the first quality a stamp or label which certainly appears to have been formed upon the model of the plaintiffs' trade-mark. They do not, however, use the word "patented," nor do they call their leather cloth "tanned;" but it is unnecessary to pursue the inquiry as to difference or identity, for I will assume, for the purposes of * 147 this decision, that there is so much designed * similarity as would induce the Court to grant an injunction if the plaintiffs' title were free from objection.

The Vice-Chancellor is reported to have said, "I hold, therefore, that the plaintiffs, having purchased the business" (that is, the business of the international company), "are perfectly entitled to use the trade-mark formerly used by their vendors." (a) The plaintiffs' label or trade-mark, however, contains the following assertions or representations: First, that the articles so stamped are the goods of the Crockett International Leather Cloth Company. Secondly, that they have been made or manufactured by J. R. & C. P. Crockett. Thirdly, that they are tanned leather cloth. Fourthly, that the articles are patented by a patent obtained in January, 1856; and lastly, that they were made either in the United States of America or at West Ham, in England. Each of these statements or representations is untrue when applied to the goods made and sold by the plaintiffs.

Of these several untrue statements the most material is the false representation made by the plaintiffs' label, that every piece of cloth so stamped or branded is tanned, and included in the patent of January, 1856, which was a patent for tanning leather cloth; whereas it is clear upon the evidence that the goods made and sold by the plaintiffs are not tanned unless specially ordered, and that to the great bulk of the plaintiffs' manufactures the words "tanned and patented" are unduly applied. The Vice-Chancellor is reported to have said upon this point, "Perhaps it would have been better to use those words only on the tanned cloth; but it appeared to me on a former occasion quite impossible for any one to be misled into buying the untanned for the tanned article." (b)

(a) 1 H. & M. 289.

(b) 1 H. & M. 293.

That is, the Vice-Chancellor means to say that any buyer
 * of ordinary discernment would perceive that the cloth was * 148
 not tanned, and, therefore, would not be deceived by the
 statement that it was. This, however, is not the fact, for the
 tanning might have been applied on the side which is covered by
 the composition; but I cannot receive it as a rule, either of
 morality or equity, that a plaintiff is not answerable for a false-
 hood, because it may be so gross and palpable as that no one is
 likely to be deceived by it. If there be a wilful false statement I
 will not stop to inquire whether it be too gross to mislead.

I am told that the Vice-Chancellor put the case of Morrison's
 pills, and concluded that the present maker of that medicine,
 though not bearing the name of Morrison, would be protected in
 the exclusive use of the appellation; and rightly, because the
 words "Morrison's pills" have become the name of the thing
 sold, in the same manner as "James' powder" is the name of a
 celebrated medicine, and as the words "Macintosh," "Brougham,"
 and "Wellingtons" are the designations of different articles. So
 in the present case, the cloth made and sold by the plaintiffs might
 be properly called and sold by them as "Crockett's Leather Cloth,"
 for that has become the proper designation of the manufacture.

The Vice-Chancellor is apprehensive that if he refuses the
 plaintiff relief, he must hold that where the name of a deceased
 partner is continued in the firm by his surviving partners they
 would be guilty of a fraud upon the public. To continue the old
 style of a firm is a very different thing from making false repre-
 sentations with respect to a vendible commodity in order to give it
 greater value and create for it a greater demand in the market.
 The plaintiffs impose upon the public by selling goods, which
 are in reality made by themselves at their manufactory * at * 149
 West Ham, as being the goods of the Crockett International
 Leather Cloth Company, and as having been manufactured by J.
 R. and C. P. Crockett, who were the original inventors and manu-
 facturers; and further, they describe and sell untanned goods as
 being tanned and included in a patent which has not yet expired.
 Their request is to be protected, and therefore justified, in continu-
 ing to make these untrue statements to the public in order to
 secure a monopoly for their commodity.

There is a homely phrase, long current in this Court, that a

plaintiff must come into equity with clean hands.¹ That is not the case with the present plaintiffs, whose case is condemned by the principles to which they appeal, and I must therefore reverse the decree of the Vice-Chancellor and dismiss their bill; but, as I do not approve of the conduct of the defendants, I dismiss it without costs.

This decision was affirmed on the plaintiffs' appeal to the House of Lords. (a)

1863. November 2, 3. December 21. Before the Lord Chancellor Lord WESTBURY.

The jurisdiction of the Court of Chancery in the protection of trade-marks rests upon property, and fraud in the defendant is not necessary for the exercise of that jurisdiction.²

Observations on *dicta* to the contrary, and as to why imposition on the public is necessary for the plaintiff's title.³

The name of the first maker of an article may in time become a mere sign of the quality of the article, and cease to be a representation that the article is the manufacture of any particular person.

Observations on the distinction between a name and a trade-mark, and the respective legal rights flowing from them.

Where, in the judgment of the Court, certain initial letters, surmounted by a crown, had, although originally representing the names of certain partners, become and were a trade-mark; that is, a brand which had reputation and currency in the market as a well-known sign of quality: *Held*, that as such the trade-mark was a valuable property of a partnership constituted by successors to the original partners, but not having the same initials, as an addition to their works, and might be properly sold with the works, and therefore

(a) 11 H. L. Cas. 523.

¹ See *Candee v. Deere*, 10 Am. Law Reg. (N. S.) 694, 707, 708 in note; S. C., 54 Ill. 439; *Fitridge v. Wells*, 13 How. Pr. 385; S. C. 4 Abb. Pr. 144; *Partridge v. Menck*, 2 Sandf. Ch. 622.

² See *Leather Cloth Co. v. American Leather Cloth Co.*, *ante*, 137.

³ See *Lee v. Haley*, 39 L. J. Ch. 284; L. R. 5 Ch. Ap. 155; 18 W. R. 181, 242; 22 L. T. (N. S.) 251, 546; *Croft v. Day*, 7 Beav. 86; *Kelly v. Hutton*, L. R. 3 Ch. Ap. 708; *Bradbury v. Beeton*, 18 W. R. 33; *Edelsten v. Edelsten*, 1 De G., J. & S. 185, and cases in note (2).

properly included as a distinct subject of value in the valuation to the surviving partner.¹

Good-will, *held*, to be a distinct subject of value, and as such to be included in any sale or valuation to the surviving partner, but with the qualification that it was not to be valued, on the principle that the surviving partner, if he were not the purchaser, would be restrained from setting up the same description of business.²

THIS was an appeal by the plaintiffs in a partnership suit from such parts of a decree of the Master of the Rolls as are herein after specified.

The facts of the case sufficiently appear from the Lord Chancellor's judgment, which adopted in great measure the material arguments addressed to the Court on behalf of the appellants. The argument on the part of the respondent was twofold, viz.: first, that there could be no property in a trade-mark; secondly, that if there could, still, on the true construction of the partnership articles, neither the trade-mark nor the good-will of the business ought to be valued as against the surviving partner.

The Attorney-General (Sir R. PALMER), *Mr. Selwyn*, and *Mr. Eddis*, appeared for the appellants; and

Mr. Hobhouse and *Mr. Fischer*, for the respondent.

* The authorities referred to were the following, viz.: — * 151

On the part of the appellants, *Motley v. Downman*, (a) *Churton v. Douglas*, (b) *Robertson v. Quiddington*, (c) *The Leather Cloth Company, Limited v. The American Leather Cloth Company, Limited*, (d) *The Emperor of Austria v. Day*, (e) *Prince Albert v. Strange*, (g) *Smith v. Everett*, (h) *Mellersh v. Keen*, (i) *Bradbury*

(a) 3 My. & Cr. 1.

(c) 28 Beav. 529.

(b) Johns. 174, 187, *seq.*

(d) 1 H. & M. 271; S. C. on appeal, *supra*, p. 137.

(e) 2 Giff. 628.

(h) 27 Beav. 446.

(g) 1 Mac. & G. 25.

(i) 27 Beav. 236.

¹ See *Kelly v. Hutton*, L. R. 3 Ch. Ap. 708; 16 W. R. 1182; *Bradbury v. Beeton*, 18 W. R. 33; *Ex parte Ross*, 2 De G. & J. 230; *Maxwell v. Hogg*, L. R. 2 Ch. Ap. 307; *Leather Cloth Co. v. American Leather Cloth Co.*, *ante* 137, note (1); *Kerr Inj.* 479; *Candee v. Deere*, 10 Am. Law Reg. (N. S.) 694, and note at the end; S. C. 54 Ill. 439; *Bury v. Bedford*, *post*, 352.

² See *Collyer Partn.* (5th Am. ed.) §§ 161-164; *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 68.

v. *Dickens*, (a) *Tudor's Leading Cases in Mercantile and Maritime Law*. (b)

On the part of the respondent, *Cruttwell v. Lye*, (c) *Cook v. Collingridge*, (d) *Farr v. Pearce*, (e) *Hall v. Hall*, (g) *Wedderburn v. Wedderburn*, (h) *Hammond v. Douglas*, (i) *The Collins Company v. Brown*, (k) *Perry v. Truefitt*, (l) *Singleton v. Bolton*, (m) *Clark v. Freeman*, (n) *Ex parte Thomas*, (o) *Hopkins v. Hitchcock*, (p) *Pidding v. How*, (q) *Flavel v. Harrison*, (r) *Lewis v. Langdon*, (s) *Webster v. Webster*, (t) *Southern v. How*, (u) *Blanchard v. Hill*, (v) *Crawshay v. Thompson*, (w) *Welch v. Knott*. (x)

* 152 The Lord Chancellor, during the arguments, referred * to *Millington v. Fox*, (y) and at their close reserved his judgment.

December 21.

THE LORD CHANCELLOR. — By the articles of partnership between the defendant Mr. Barrows and the late Mr. Joseph Hall, dated 3d May, 1847, it was in effect provided that in case either of the partners should die during the partnership and should not nominate a son to succeed him, the surviving partner should have the option of taking to himself all the stock belonging to the partnership, on paying to the personal representatives of the partner so dying the amount or value of the share of such deceased partner. It is clear that the word “stock” includes all which the articles declared should constitute the capital of the partnership, and which capital the articles state was to comprise “the iron works, with the houses, land, mines, and premises adjoining and belonging to the partnership, including the machinery and apparatus attached thereto, and

(a) 27 Beav. 53.

(b) Page 313.

(c) 17 Ves. 335.

(d) Jac. 607; 27 Beav. 456, n.

(e) 3 Madd. 74.

(g) 20 Beav. 139.

(h) 22 Beav. 84.

(i) 5 Ves. 539.

(k) 3 K. & J. 419.

(l) 6 Beav. 66.

(m) 3 Doug. 293.

(n) 11 Beav. 112.

(o) 2 M. D. & De G. 294.

(p) 14 C. B. (N. S.) 65.

(q) 8 Sim. 477.

(r) 10 Hare, 467.

(s) 7 Sim. 421.

(t) 3 Swanst. 490, n.

(u) Poph. 143.

(v) 2 Atk. 484.

(w) 4 Man. & Gr. 357, 377, 380.

(x) 4 K. & J. 747, 751.

(y) 3 My. & Cr. 338.

the stock-in-trade, implements, tools, and other property belonging to the business."

The partnership expired by effluxion of time, on the 7th May, 1858; but the business was carried on by the defendant and Mr. Hall, down to the death of the latter, in January, 1862, on the same terms and in the same manner as before, without any new articles or agreement.

This bill has been filed by the executors of Mr. Hall, for an account of the partnership dealings and transactions; and it prays that the partnership business, and * all the stock, * 153 good-will, property, and effects thereof, may be sold under the direction of the Court. The Master of the Rolls has directed a sale of the iron-works, business, good-will, and property of the partnership as a going concern, and he has appointed a manager to continue and conduct the business in the mean time.

It was stated at the bar that a sale was directed as the best mode of ascertaining the value of the property, and that it was not intended to deprive the surviving partner of his right to take the share of the deceased partner, a right which he is desirous of exercising; but I cannot understand how a sale can be used merely for the purpose of ascertaining value. If it is intended to make the surviving partner outbid every other offer, great and unjust exaction may be the result; and on the other hand, if the object of the sale be known, *bonâ fide* bidders would not be likely to attend, and the purpose of the sale would be entirely frustrated.

Inasmuch, therefore, as the plaintiffs are willing that the defendant shall buy the stock at a valuation, and as the defendant by his counsel has given an undertaking to the Court that he will purchase all which the Court shall find to be the stock of the partnership at such prices as the Court shall fix to be the value, I must direct that the value of the property shall be ascertained in Chambers in the usual manner.

But the defendant objects that the good-will of the business, and also a certain trade-mark used by the partnership, ought not to be included in the valuation. The Master of the Rolls was of opinion that the good-will must be included in the sale, but that the trade-mark ought not to be sold.

* The circumstances attending the trade-mark are these: * 154

The iron-works in question were originally, in the year 1836, carried on by the testator Joseph Hall, the defendant Bar-

rows, and one Richard Bradley, in partnership, under the firm of Bradley, Barrows, & Hall.

In the year 1844, Bradley having retired, one John Joseph Bramah became a partner, and a new partnership was formed under the style of "Bramah, Barrows, & Hall." This continued until the death of Bramah in 1847, when a new partnership was formed under the style of "Barrows & Hall." The business of these several partnerships was extensive, and the firm of Bradley, Barrows, & Hall, marked all or the chief part of the iron manufactured by them with a particular mark or brand consisting of the letters B. B. H. and a crown, the letters being the initials of the partnership firm. This trade-mark was continued by the two succeeding partnerships, and, as I collect, is now used by the manager appointed by the Court.

The iron being of superior quality, the mark or brand has become well known in the market, and the right to use it is represented as now being of considerable value. The Master of the Rolls in his judgment has entered at some length upon the subject of trade-marks.

If I understand him rightly, he has divided trade-marks into local, — that is, marks which indicate that the article branded was made at a particular place, — and personal, — that is, marks which express that the article branded is made by a particular person or firm. The Master of the Rolls is of opinion that the right to use local trade-marks may be sold with the manufactory or works to which such marks refer; but that the right to use personal
* 155 trade-marks ought not to be sold, because * the use of them by any other person than the person directed by the mark would be a false representation to the public.

But it must be borne in mind that a name, though originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person.

The case of *Millington v. Fox* (a) affords an example of the manner in which the name of the original manufacturer being branded on the articles made becomes in time a mere indication of quality. In that case the word "Crowley" and the words "Crowley Millington" had been used for a great many years; the first by a person named Crowley, who invented a particular mode of manufacturing steel more than a century ago; and the words "Crowley Millington" by a firm of Crowley & Millington who succeeded him, as brands or marks on steel manufactured by them. The bill was filed by two persons of the name of Millington, who were descendants of the original Millington, and used the same mode of manufacturing steel, and the same marks or brands. It appeared that the defendants who had used the marks had done so in ignorance of the existence of the plaintiffs' firm and of the origin of the marks themselves, * believing * 156 them to be marks used universally in the steel trade, but a perpetual injunction was granted on the ground that the plaintiffs were entitled to the exclusive use of the names in question.

The case not only shows how the name of the first maker may become a mere sign of quality, but it is very important as establishing the principle that the jurisdiction of the Court in the protection of trade-marks rests upon property, and that fraud in the defendant is not necessary for the exercise of that jurisdiction.

In the present case it appears to me to be clear that the brand introduced by the original partnership in 1836, and which has ever since been used, consisting of the letters B. B. H. surmounted by a crown, has become and now is a mere trade-mark or symbol, and is no longer regarded or passes current in the market (if it ever did) as a guarantee or representation that the goods so marked are the manufacture of the original partnership of Bradley, Barrows, & Hall. If it were not so, the firm of Hall & Barrows would not be entitled to use these initials which they have done as matter of right, and this case must be determined upon the assumption that their partnership was so entitled.

The distinction between a name and a trade-mark must be observed. If a name impressed upon a vendible commodity passes current in the market as a statement or assurance that the commodity has been manufactured by a particular person, it may be

(a) 3 My. & Cr. 338.

true that this Court would not sell and transfer to another person the right to use the name simply and without addition ; but if it sold the business or manufacture carried on by the owner
 * 157 of the name, it might give to the purchaser the * right to represent himself as the successor in business of the first maker, and in that manner to use the name.

But, in the case before me, it is clear that the letters which form this trade-mark ceased to be the initials of the partnership firm since the beginning of the year 1847, when the new style of Barrows & Hall was adopted.

In fact there is no evidence that the mark was ever current or accepted in the market as a representation of the persons who manufactured, or of the place of manufacture, or otherwise than as a brand of quality.

There is nothing in the answer or evidence to show that the iron marked with these initials has or ever had a reputation in the market, because it was believed to be the actual manufacture of one of the two original firms. And if I adopted the distinction drawn by the Master of the Rolls between local and personal trade-marks, I should be more inclined to treat this mark as incident to the possession of the Bloomfield Iron Works, for it has been used by the successive owners of such works, and seems to have been used by the last partnership in no other right. In this respect the case resembles that of *Motley v. Downman*. (a)

But it is unnecessary to pursue this further ; for I am of opinion that these initial letters, surmounted by a crown, have become and are a trade-mark properly so called, that is, a brand which has reputation and currency in the market as a well-known sign of quality ; and that, as such, the trade-mark is a valuable property of the partnership as an addition to the Bloomfield Works,
 * 158 and * may be properly sold with the works, and, therefore, properly included as a distinct subject of value in the valuation to the surviving partner.

It must be recollected that the question before me is simply whether the right to use the trade-mark can be sold along with the business and iron-works, so as to deprive the surviving partner of any right to use the mark in case he should set up a similar business. Nothing that I have said is intended to lead to the conclusion that the business and iron-works might be put up for sale

(a) 3 My. & Cr. 1.

by the Court in one lot, and that the right to use the trade-mark might be put up as a separate lot, and that one lot might be sold and transferred to one person and the other lot sold and transferred to another, the case requiring only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property and might be sold with the business and works and as a valuable right, and if it might be so sold it must be included in the valuation to the surviving partner.¹

It was argued on the part of the defendant that there was no property in a trade-mark, and that the right to relief is merely personal, founded on the fraud that is committed when one man sells his own goods as the goods of another. It is true that in some cases are found *dicta* by eminent Judges that there is no property in a trade-mark, which must be understood to mean that there can be no right to the exclusive ownership of any symbols or marks universally in the abstract; thus, an iron-founder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed on cotton or woollen goods; for a trade-mark consists in the exclusive right to the use of some name * or symbol as applied to a particular * 159 manufacture or vendible commodity, and such exclusive right is property.

Nor is it correct to say that the right to relief is founded on the fraud of the defendant; for, as appears by *Millington v. Fox*, (a) the plaintiff is entitled to relief even if the defendant can prove that he acted innocently and without any knowledge of the right of the plaintiff.

Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury if the mark used by the defendant is not such as is mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff;² but the true ground of this Court's jurisdiction is property, and the

(a) 3 My. & Cr. 338.

¹ See *Coffin v. Brunton*, 5 McLean, 256.

² See *Edelsten v. Edelsten*, 1 De G., J. & S. 185, and cases in note (2); *Kerr Inj.* 483, 484; *Walton v. Crowley*, 3 Blatch. C. C. 440; *Clark v. Clark*, 25 Barb. 79; *Merrimac Manuf. Co. v. Garner*, 4 E. D. Smith, 387; *Hirst v. Denham*, L. R. 14 Eq. 542.

necessity of interfering to protect it by reason of the inadequacy of the legal remedy.

The remaining question relates to the good-will of the business. I agree with the Master of the Rolls that the good-will ought to be included in any sale or valuation as a distinct subject of value ; but I think it necessary that the direction to value the good-will should be accompanied by a declaration defining what is meant by it, at least negatively, — that is to say, a declaration that the good-will is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business. No such restriction could be thrown on the surviving partner if the sale were to a stranger ; but still, even without any such restriction, there may be a subject of value directed by the term “ good-will ” that ought to be

* 160 taken into account in making the valuation. The * result, therefore, is, that I must reverse the decree of the Master of the Rolls, and declare that inasmuch as the defendant, as surviving partner, has by his counsel submitted and agreed to accept and take all the stock belonging to the partnership according to the construction which the Court shall put upon the word “ stock,” the order for sale made by the Master of the Rolls ought to be reversed ; and that the words “ stock belonging to the partnership ” include and denote the partnership business and the iron-works, with all the houses, land, mines, and premises adjoining and belonging to the partnership, together with the machinery and apparatus attached thereto, and all the stock in trade, implements, tools, and other property belonging to the said business ; and that the exclusive right to use the trade-mark of the partnership is part of the property of the partnership, and ought to be included in the valuation ; and that the good-will of the business of the partnership ought also to be valued, but that the same is to be valued on the footing of the surviving partner being at liberty to set up and carry on the same business as that of the partnership ; and with these declarations refer it to the Judge at Chambers to make the valuation accordingly as of a going concern, with all necessary directions. Continue the manager, with liberty to the defendant to make any application respecting the same. The costs of rehearing to be costs in the cause.

* THE EARL OF PORTARLINGTON v. DAMER. * 161

1868. November 16. December 21. Before the Lord Chancellor Lord WESTBURY.

A testator, after bequeathing certain legacies, devised his freehold estate, called R., to his brother in tail male, but subject to and charged with the payment of two annuities; and he directed that the residue of his estates therein after devised should be considered and made the primary fund for the payment of his debts and the several legacies given by his will, and that his R. estate "herein before devised subject as aforesaid," to his brother in tail male, should not be subject or liable to the payment of the said legacies, unless the residue of his estates therein after specifically bequeathed for those purposes should prove of insufficient value. That event having happened, *held*, that the subject-matter which was charged with the legacies was only the R. estate burdened with the annuities, which consequently had priority thereon over the legacies.

The residuary estate was expressly charged with the legacies given by the testator's will and every legacy or legacies to be given by any codicil or codicils thereto, unless a contrary direction should be expressed in such codicil or codicils. By a codicil the testator gave an annuity and directed the purchase of a house, each as a charge on his "estates in Ireland," out of which country he had no real estate. *Held*, that this last annuity and the purchase-money of the house were, in like manner as the legacies given by the will, charged on the R. estate, but subject to the prior annuities.

THIS was an appeal from a decision of the Vice-Chancellor KINDERSLEY, in respect of certain questions arising upon the construction of the will and codicil of John Earl of Portarlington, the testator in the cause.

By the will, which was dated in April, 1844, the testator, after bequeathing certain legacies, devised and bequeathed his freehold estate, called the Roscrea estate, in the county of Tipperary, to his brother, Lieutenant-Colonel the Hon. George Lionel Dawson Damer, in tail male, but subject nevertheless and charged and chargeable with the payment of two annuities of 500*l.* and 200*l.* respectively. The will then proceeded thus: "And I do hereby direct that the residue of my estates herein after devised shall be considered and made the primary fund for the payment of my debts and the several legacies given by this my will; and that my Roscrea estate herein before devised subject as aforesaid to the said George Lionel Dawson Damer, and the heirs male of his body, shall not

be subject or liable to the payment of the said debts and legacies, unless the said residue of my estates herein after specifically

* 162 * bequeathed for those purposes shall prove of insufficient value.”

Then followed a devise of the testator's residuary realty upon trust for sale, and a declaration that the proceeds of the sale should, after payment of costs, charges, and expenses, and of the annuities before mentioned, and of interest on debts carrying interest, and his funeral and testamentary expenses, and interest on the legacies at 5*l.* per cent, be held by his trustee or trustees for the purpose of paying and discharging “the principal of all my just debts and the legacies given by this my will, in such order and course as they or he may or shall think fit, and every legacy or legacies to be given by any codicil or codicils hereto, unless a contrary direction shall be expressed in such codicil or codicils,” and otherwise.

The codicil was dated in December, 1845, and was made when the testator was *in extremis*. It was in the following words:—

“I give and bequeath to Ellen Whittaker Barley the sum of 300*l.* a year for her life; also to be bought for her the house situate at 10 China Terrace, Kensington Road; this is my last wish and testimony to be done for her after my decease out of my estates in Ireland, in case I do not live to fulfil these my last wishes.”

The testator had no real estate elsewhere than in Ireland, and his residuary real estate had been sold, but the proceeds were insufficient for the payment of every thing; and the Roscrea estate had accordingly also been sold, and the proceeds were in Court. And the questions raised by the present appeal were—

1. Whether the legacies under the will were chargeable
* 163 * on the proceeds of the Roscrea estate *pari passu* with or only subject to the annuities of 500*l.* and 200*l.* respectively charged upon that estate?

2. Whether the 300*l.* annuity given by the codicil was chargeable on the proceeds of the Roscrea estate?

The Vice-Chancellor decided that—

1. The legacies were only chargeable on the proceeds of the Roscrea estate, subject to the 500*l.* and 200*l.* annuities.

2. That the 300*l.* annuity given by the codicil was chargeable on the proceeds of the Roscrea estate.

From this decision an appeal was brought by legatees under the will.

Sir Hugh Cairns, *Mr. Chapman Barber*, and *Mr. Bagshawe*, for the appellants, argued to the effect stated in the Lord Chancellor's judgment; and they referred to *Jackson v. Hamilton*, (a) and the corrections there appearing of the case of *Long v. Short*, (b) *In re Emmerton's Estate*, *Maskell v. Farrington*, (c) *Conron v. Conron*, (d) and *Creed v. Creed*. (e)

At the conclusion of their arguments, the Lord Chancellor intimated that he had no doubt on the points which had been argued, but said that he would read the will and codicil through, and, in case of need, would hear counsel on the other side.

December 21.

* The Lord Chancellor, on this day, without calling upon * 164 the Attorney-General (Sir R. PALMER), *Mr. Wickens*, *Mr. Phear*, or *Mr. H. R. Young*, who appeared in opposition to the appeal, delivered his judgment as follows:—

The late Earl of Portarlington devised his Roscrea estate in tail male, subject to certain annuities. He directed that the residue of his estates should be the primary fund for the payment of his debts and legacies, and that the Roscrea estate should not be subject to such debts and legacies unless the residue should prove of insufficient value.

The first question before me turns upon the particular expression in this devise, "my Roscrea estate herein before devised subject as aforesaid to the said George Lionel Dawson Damer and the heirs male of his body."

(a) 3 Jo. & Lat. 702, 714; and in a subsequent stage, 9 Ir. Eq. 430.

(b) 1 P. Wms. 403; and see *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654.

(c) 3 De G., J. & S. 338.

(e) 11 Cl. & Fin. 491.

(d) 7 H. L. Cas. 168.

The legatees under the will, who are the appellants, contend that their legacies ought to stand on an equal footing with the annuities; and for that purpose it has been argued on their behalf that the words "herein before devised subject as aforesaid," which are added to the substantive "Roscrea estate," are to be taken not as part of the description of the subject-matter, but as a narration, or as words of reference only to what has been previously done by the testator; and it is sought to take the substantive words "Roscrea estate" apart from the adjective, the annexed words, and to read the annexed words as if the word "which" had been inserted, and then to read them as if they had been "my Roscrea estate which I have herein before devised subject as aforesaid." If that could be done, the legacies would then be charged upon the Roscrea estate as entirely as and might come into competition with the annuities.

* 165 * I am unable to adopt that construction, nor, if I could do so, do I think it would get rid of the effect of the words "subject as aforesaid." I take the words as meaning to describe that thing which Colonel Damer took by virtue of the devise; what Colonel Damer took by virtue of the devise was the Roscrea estate burdened with the annuities. In my judgment, therefore, the subject-matter which is charged with the legacies in the contingency which has happened is only the Roscrea estate burdened with the annuities. I consequently give effect to the words "subject as aforesaid" by making the legacies a charge upon the Roscrea estate, subject, nevertheless, to the antecedent and prior incumbent annuities. That is the interpretation which, in my judgment, is the nearest to the words of the will.

The second point argued before me arises upon the codicil to the earl's will.

[His Lordship stated the effect of the codicil and proceeded thus:] I think that this annuity and the purchase-money of the house are legacies which rank with the legacies given by the will, and in like manner are charged upon the Roscrea estate, subject to the annuities. The particular direction in the codicil is not, I think, sufficient to divert this legacy from the general gift of legacies, which are made chargeable expressly on the Roscrea estate.

I must affirm the decree of the Vice-Chancellor, and dismiss the petition of rehearing, with costs.

* MORTIMER v. PICTON.

* 166

1863. December 5, 21. 1864. January 12. February 13. Before the Lord Chancellor Lord WESTBURY.

An intended husband, by his marriage settlement and under a power enabling him, appointed certain freeholds, of which he was tenant for life in possession, to trustees during his intended wife's life upon trust out of the rents and profits to pay her an annuity of 500*l.* for her jointure in lieu of dower, and gave her the usual powers of distress and entry for securing the due payment of the annuity (such powers extending to give her the enjoyment in case she took possession without impeachment of waste, and such extension being beyond her power to give), and covenanted for further assurance. He afterwards acquired the fee.

Subsequently, in 1843, the settled hereditaments being in part subject to an antecedent mortgage created by the husband, and being considered by the wife an insufficient security for her annuity, the husband, by an indenture reciting these facts, assured, subject to the mortgage, the same and other property, the wife releasing her 500*l.* annuity, to trustees upon trust (in the events which happened) for sale, and for the investment of the whole if not more than sufficient, and if more than sufficient then of a sufficient part thereof, in a competent share of consols to produce a clear yearly income of 500*l.*; or if the said moneys should not be equal to purchase a sufficient amount of such stock to produce such yearly income, then for the investment of the whole of such moneys in or upon some or one of the parliamentary stocks or public funds, or upon government or real securities, with power of variation of securities: and after the death of the husband for payment of the income to the wife during her life, in lieu and full satisfaction of her annuity under the marriage settlement, with remainder over.

The settled property was from time to time sold, and the net proceeds invested in consols; but the investment failed to produce 500*l.* a year. The husband having sold his reversionary interest in part of the trust fund expectant on his wife's death and died: *Held*, in a suit instituted by the wife to have the trusts of the settlement and the deeds of 1843 carried into effect, —

1. That the object of the arrangement of 1843 was to give the wife a better means of insuring to her 500*l.* a year; but that she had no right to come upon the capital of the investment to make good that annual sum.
2. That the income of the investment in consols falling short of that annual sum, and the chief object of the trust being likely to be defeated by the insufficiency of the investment, the case was one for a change of investment into East India stock, under Stats. 22 & 23 Vict. c. 35, § 32, 23 & 24 Vict. c. 38, §§ 10, 11, 12, and the General Order of 1st February, 1861, notwithstanding the opposition of the purchasers of the reversion of part of the fund, but without prejudice to their rights as between the husband's execu-

tors and themselves, and that the wife was entitled to the interest of that new investment as from the date of the order for it.

Quære: Whether she was entitled to any order in respect of arrears of the annuity accrued prior to the order.

THIS was an appeal by the plaintiff in the suit, Jane Mortimer, who was the widow of Edward Horlock Mortimer deceased, from a decision of the Master of the Rolls.

* 167 * The suit was instituted against the trustees of the appellant's marriage settlement, and of two subsequent indentures of the 10th of June, 1843, the executors of her late husband's will, and the trustees of a reversionary interest society, as defendants, for the purpose of having the trusts of the settlement and of the indentures of the 10th of June, 1843, carried into execution, accounts taken of what was due in respect of the appellant's annuity thereunder, and payment of its arrears, and provision for its future payment, and consequential and ancillary relief.

The suit came on for hearing on the 18th of May, 1863, before the Master of the Rolls, who held that the appellant was not entitled to payment of the arrears of her annuity out of the *corpus* of the fund in Court, and declined under the circumstances of the case to sanction any variation of the form of the investment of the fund which would have the effect of diminishing its capital, and so favouring the tenant for life at the expense of the remainder-men.

The facts of the case were shortly as follows:—

The appellant's marriage settlement was dated the 25th of October, 1831, and was expressed to be made between Edward Horlock Mortimer the intended husband of the first part, the appellant the intended wife of the second part, and John Williams and Charles Mortimer of the third part. It recited amongst other things an agreement on the treaty for the marriage that Edward Horlock Mortimer should settle on the appellant, in case she should survive him, a clear annual sum of 500*l.*, to be issuing out of the hereditaments therein after described, for her life for her jointure in lieu of dower, and witnessed that Edward Hor-

* 168 lock Mortimer, in pursuance * of a power enabling him in that behalf, appointed that certain specified freehold hereditaments, of which he was tenant for life in possession, should, in case the intended marriage should be solemnized, from and immediately after his decease remain to the use of John Williams and

Charles Mortimer and their heirs during the appellant's life, upon trust out of the rents and profits to pay to her and her assigns an annual sum of 500*l.* for her jointure in lieu of dower, and to pay the residue to the reversioners or reversioner.

The settlement contained provisions for the substitution, with the appellant's consent, of other hereditaments for those actually settled as a security for the annuity, and the usual powers of distress and entry in favour of the appellant, in order to ensure its due payment; these latter powers, however, purported to authorize the appellant, if she entered into possession, to occupy without impeachment of waste, and to that extent were in excess of the power vested in Edward Horlock Mortimer at the date of the settlement. He, however, in 1834, acquired the reversion in fee in the hereditaments of which at the date of the settlement he was tenant for life only, and he had by the settlement entered into the usual covenant for further assurance.

The property settled was in the neighbourhood of a manufacturing district, and was at the time producing upward of 600*l.* a year, and would, therefore, had it so continued, have been an ample security for the annuity.

Part of it, however, was subject to a mortgage of 1500*l.* antecedently created by Edward Horlock Mortimer, a fact not known to the appellant, and by her alleged to have been studiously concealed from her at the time when the settlement was executed.

The marriage was *solemnized, and the husband and wife, * 169 in 1841, separated after ten years of married life.

On the 10th of June, 1843, an indenture of that date was executed, and afterwards acknowledged by the appellant, which was expressed to be made between Edward Horlock Mortimer of the first part, the appellant of the second part, and the settlement trustees John Williams (then John Picton) and Charles Mortimer of the third part.

It recited the marriage settlement, and that certain parts of the hereditaments comprised in it were at its date and then still remained subject to a mortgage of 1500*l.*, and that such hereditaments, subject to the mortgage so far as they were affected thereby, were considered by the appellant an insufficient security for her 500*l.* annuity, and an agreement, at her request and for the purpose of more effectually securing the payment thereof, or of an annuity

of the like amount, for the assurance made by the indenture now in statement.

By the operative parts of the indenture now in statement, Edward Horlock Mortimer, by virtue of certain powers enabling him in that behalf, appointed the hereditaments comprised in the settlement (the appellant releasing them from her 500*l.* annuity), and also certain other hereditaments, to the use of John Picton and Charles Mortimer, their heirs and assigns, subject only to the 1500*l.* mortgage, upon trust at any time within three calendar months then next, at the request of Edward Horlock Mortimer, to join with him in raising by mortgage such sum or sums of money as should be sufficient to purchase in an insurance office an annuity of 500*l.* for the appellant's life in case she survived him,

* 170 and to stand possessed of the moneys so to be raised * upon the trusts of an indenture bearing even date therewith; and upon further trust, if such sum or sums should not be so raised within three calendar months, to sell the same hereditaments, and, after paying the expenses and the money due on the mortgage, to hold the surplus upon the trusts of the indenture of even date. And it was declared that in case a competent sum should be raised and applied in the purchase of the annuity, the hereditaments should be considered as the absolute property of Edward Horlock Mortimer in fee; but that nothing in the indenture now in statement, or in the indenture of even date therewith, should prejudice or affect the right or title of the appellant to the jointure or rent-charge of 500*l.* secured by the settlement in case any money should be raised by mortgage, and a competent part thereof should not be applied in the lifetime of Edward Horlock Mortimer in the purchase of such an annuity as aforesaid, notwithstanding the acknowledgment by the appellant of the indenture now in statement.

An indenture of even date was contemporaneously executed, which was expressed to be made between Edward Horlock Mortimer of the first part, the appellant of the second part, John Picton and Charles Mortimer, and also two gentlemen, named Bishop and Bush respectively, of the third part. By it it was declared that the sum or sums to be raised by mortgage under the trusts of the indenture of even date therewith should be held in trust for the investment of a sufficient part thereof in the pur-

chase in an insurance office of an annuity of 500*l.* in the name of the appellant for her life, in case she should survive Edward Horlock Mortimer, in full satisfaction of her jointure, and for payment of the residue, after payment of incidental expenses, to Edward Horlock Mortimer; and that the moneys to
 * arise from the sale of the said hereditaments were to be * 171
 held in trust for the investment of the whole, if not more than sufficient, but if more than sufficient then of a sufficient part thereof, in the names of Messrs. Picton, Mortimer, Bishop, and Bush in the purchase of a competent share or shares of 3*l.* per cent consolidated bank annuities to produce a clear yearly income of 500*l.*, or if the said moneys should not be equal to purchase a sufficient amount of such stock to produce such yearly income as aforesaid, then to invest the whole of the said moneys in or upon some or one of the parliamentary stocks or public funds of Great Britain or at interest upon government or real securities in England or Wales, but not in Ireland, with the usual powers of variation of securities into other securities of the same or the like nature. And it was declared that Messrs. Picton, Mortimer, Bishop, and Bush should stand possessed of the trust moneys, stocks, funds, and securities, and the dividends thereof, upon trust for Edward Horlock Mortimer during his life, and after his decease for the appellant, in case she should survive him, and her assigns during her life, in lieu and full satisfaction of the annual sum of 500*l.* secured for her jointure by the marriage settlement; and subject to the trusts aforesaid the four trustees were to stand possessed of the trust moneys, including any excess thereof, if any, beyond what would be equal to purchase a sufficient amount of stock for the purpose aforesaid, and the stocks, funds, and securities for the same, and the interest, dividends, and annual produce thereof, in trust for Edward Horlock Mortimer, his executors, administrators, and assigns.

The power of raising money by mortgage contained in the first of the above-stated indentures of the 10th of June, 1843, was not exercised, but the property * therein comprised was * 172
 sold as opportunity offered, and the net proceeds of the sales, after providing for the payment of the mortgage debt and other expenses, were invested in the names of the four then trustees of the second indenture of the 10th of June, 1843, in the purchase of consols, which, at the hearing of the cause, were rep-

resented by a sum in Court of 12,365*l.* 13*s.* 8*d.* consols, a sum producing by its dividends an annual sum far less than 500*l.*, and the trusts of these consols were declared by a deed of the 6th of November, 1846, endorsed on the second of the indentures of the 10th of June, 1843.

In December, 1850, Edward Horlock Mortimer sold and assigned to the trustees of the Reversionary Interest Society above referred to all his reversionary interest expectant on the appellant's death in 4766*l.* 12*s.* 8*d.* consols, being so much of the larger sum of like annuities as had at that time been invested, and he subsequently died.

Edward Horlock Mortimer having died, the appellant applied to the trustees for payment of her annuity, and ultimately filed the bill in this suit, seeking thereby to have the money then invested in consols varied into some form of investment which would produce something more nearly approximating to the 500*l.* annuity, which, as she alleged, it was the object of the marriage settlement and the indentures of the 10th of June, 1843, to secure for her, than did the dividends on those consols; if not, to have the difference made good out of the capital of the fund.

With reference to the first branch of the relief sought, the question turned on the provisions of the Statutes 22 & 23 Vict. * 173 c. 35, § 32, and 23 & 24 Vict. c. 38, §§ 10, * 11, 12, and the General Order of 1st February, 1861, which are respectively set out below. (a)

(a) Stat. 22 & 23 Vict. c. 35, § 32. "When a trustee, executor, or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper."

Stat. 23 & 24 Vict. c. 38, § 10. "It shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said Court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of Lords Justices of appeal and the Master of the Rolls in Ireland, to make such general orders from time to time as to the investment of cash under the control of the Court, either in the three per cent consolidated or reduced or new bank annuities, or in such other stocks, funds, or securities as

* *The Attorney-General* (Sir R. PALMER), *Mr. Southgate*, * 174 and *Mr. Waller* appeared for the appellant.

Mr. Selwyn and *Mr. Schomberg*, for Edward Horlock Mortimer's executors.

Mr. Rasch, for the trustees of the Reversionary Interest Society.

Mr. Freeling, for the three out of the four trustees of the indentures of 1843.

The fourth trustee, who was one of the trustees of the marriage settlement, did not appear on the appeal.

For the appellant it was contended that the security created by the marriage settlement, which included the right of the appellant, if she took possession, to occupy without impeachment of waste, when coupled with the covenant for further assurance (as to the

he or they shall, with such advice or assistance, see fit; and it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion of any three per cent bank annuities now standing, or which may hereafter stand, in the name of the Accountant-General of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds, or securities upon which, by any such general order as aforesaid, cash under the control of the Court may be invested; all orders for such conversion of bank annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the Court shall direct."

Sect. 11. "When any such general order as aforesaid shall have been made, it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds, or securities in or upon which by such general order cash under the control of Court may from time to time be invested."

Sect. 12. "Clause thirty-two of the said Act of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall operate retrospectively."

General Order, 1st February, 1861. 1. "Cash under the control of the Court may be invested in bank stock, East India stock, exchequer bills, and 2l. 10s. per cent annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales; as well as in consolidated 3l. per cent annuities, reduced 3l. per cent annuities, and new 3l. per cent annuities."

effect of which reference was made to *King v. Jones* (a) and Sugden's Vendors and Purchasers (b)), and the acquisition by Edward Horlock Mortimer in 1834 of the reversion in fee of the settled estates, extended to bind the *corpus* of the estate, and therefore of the fund in Court, and had priority to the mortgage for 1500l. ;

and that the whole scope of the indentures executed in 1843

* 175 was * to charge the appellant's annuity upon the whole estate, and therefore upon the whole fund, so as to give her a clear 500l. a year. At any rate, the case was a proper one for the application of the provisions of the statutes and order above referred to, so that the investment might be changed into one yielding a larger dividend, such as bank stock or East India stock, and thus the object which the parties had in view in entering into the arrangement which was carried into effect by the indentures of 1843, viz., the securing to the appellant 500l. a year, might be attained. The consent of the reversioners was not necessary ; the matter was in the discretion of the Court alone.

For the three trustees of the indentures of 1843 it was contended that, regard being had to the provisions of those indentures, the appellant's annuity ought not to be made good out of the capital of the fund, but no objection was made to such a change of investment as the appellant desired, if practicable.

The fourth trustee had put in an answer, submitting to act under the direction of the Court, but declining to consent to the desired change of securities out of Court.

For Edward Horlock Mortimer's executors it was contended that the desired change could not be made by the Court at the request of the appellant alone (who was a party to the arrangement of 1843 ; an arrangement expressed to be undertaken at her request, and whereby she agreed to take the interest of the invested moneys in lieu of the 500l. annuity) against the wishes of the reversioners, and without the affirmative exercise of the discretion of the trustees. An investment in East India stock would, in all

probability, in fact, almost certainly, result in a loss to the
* 176 reversioners, and the Court * ought to hold an even hand as between all interested parties, especially in a case like the present, where the whole scope of the arrangement of 1843 was not that the appellant should have at least 500l. a year, but that she should have not more than that annual sum.

(a) 5 Taunt. 418.

(b) Ed. 14, p. 613, pl. 19.

Reference was made on their behalf to *Cockburn v. Peel*. (a)

For the trustees of the Reversionary Interest Society objection was made to an investment in East India stock; and even assuming the Court to sanction an investment in bank stock or on mortgage, it was submitted that there ought to be a declaration that the change was to be without prejudice to any question between them and Edward Horlock Mortimer's executors as to the right of the society to have in due course the specific sum of consols which they had purchased from him.

At the conclusion of the arguments, the Lord Chancellor remarked, that whatever he might do in the way of saving the rights of the Reversionary Interest Society as between themselves and Edward Horlock Mortimer's executors, the society could not interfere with the exercise of the investment powers of the settlement, (b) into which his Lordship thought, subject to any argument which might be presented to the contrary, must be read as incorporated by the 32d section of the Statute 22 & 23 Vict. c. 85, the power by that section given to trustees. In the present case the trustees had a large power enabling them to * select * 177 a variety of investments, and his Lordship, as at present advised, thought it incumbent upon them to invest the fund in such a manner as would best enable them to answer the purposes of their trust. As to the three kinds of investment mentioned in the section of the Act in question, each had something in its disfavour, for a mortgage was attended with some peril, and also some expense, as well *in initio* as on the occasion of a transfer; bank stock, with some uncertainty, as its value depended upon the profits of a trading corporation; and East India stock, with the possibility of being paid off at 200*l.* in 1874, whereas its present price in the market was considerably over 200*l.* In this state of things, and with such intimation of his opinion, his Lordship desired to leave the choice out of the three modes of investment to the parties interested, and ordered the hearing of the suit to stand over for that purpose.

December 21.

On this day, nothing having been done in the interval by way of arrangement,

(a) 3 De G., F. & J. 170.

(b) See a somewhat similar point in *Spirett v. Willows*, L. R. 4 C. A. 407.

The Attorney-General asked for an investment of the fund in Court in East India Stock.

Mr. Selwyn objected, and argued that it was impossible to suppose that the legislature, in passing the Acts on which reliance had been placed on the other side, could have intended to interfere with the terms of a written contract.

THE LORD CHANCELLOR. — I am quite sensible of the necessity for caution in the exercise of this statutory power. It is a power which should not, I apprehend, be put in force merely for
* 178 the * purpose of augmenting the income of a tenant for life.

But possibly it was the intention of the legislature, at any rate it is a useful purpose to which the enactment may be rendered subservient, that when the condition of a trust fund is such that the income of it in its existing state of investment fails to answer its obligations or its primary purpose, the Court should then exercise the parliamentary power in order to enable the trustees to perform that duty which it was the principal object of the instrument under which they derive their authority that they should perform.

The circumstances of the present case are peculiar ; throwing, however, as it appears to me, upon the trustees, and if upon them, then also upon the Court, the obligation of exercising every power in order to accomplish, if possible, the chief and principal intention, — the contract of the parties ; the contract I mean not in the sense of pecuniary liability, but that which Lord THURLOW was in the habit of denominating the good faith and honour of the settlement.

The appellant was entitled to an income of 500*l.* a year, which was to arise by way of rent-charge out of an estate, which by reason of antecedent incumbrances was inadequate to the purpose. In the year 1843, in consequence of the fact being as I have stated, a new arrangement was made, which was in a great degree for the benefit of the husband. The appellant became a party to this arrangement by contract with her husband through the medium of the statutory power. The great object of this new arrangement was to give to this lady some better means of insuring to her the 500*l.* a year. That object is distinctly marked in the recitals of the deed, and pervades the whole arrangement. Unfortunately it is not so expressed as that I can follow her

right into the capital, *but it is so stamped upon the * 179 whole transaction that it becomes, in my judgment, the duty of the trustees so to dispose of the trust fund as to accomplish, if possible, that chief end of the whole arrangement,—the securing to her the payment of this annuity.

The powers given to the trustees by the settlement were the sole powers then known to the law; they had the power of selecting investments in government or real securities; but if having put this money into government securities, they found that the dividends arising therefrom would not answer the primary duty or object of the settlement, a moral obligation sprang into existence, binding them, if possible, to improve the investment within the limits of the settlement. The legislature in its wisdom has provided for a case of this nature by enlarging the investing powers of trustees,—an enlargement given in the expectation, no doubt, that in proper cases the enlarged powers would be exercised. And no case can be more proper for the exercise of those enlarged powers than one like the present, where the chief object of the trust is defeated by the insufficiency of the investment.

Matters frequently come before the Court in which it is required to place itself in the situation of the trustee, and it has been argued here, and correctly argued, that it is the duty of the trustees, and, therefore, of the Court, to consult the interests of all parties, and hold an even hand between them. But this is not a case where that rule applies, for unless the Court resorts to the statutory power, the very primary purpose of the trust cannot, as I have said, be fulfilled, and that by reason of the insufficiency of the investment.

With respect indeed to a particular stock which has *been suggested, East India stock, it is urged that to * 180 allow an investment in that is to expose the reversioners to almost certain loss, without providing any thing but a short and merely temporary mode of investment for the annuitant, in consequence of the power which the government has of redeeming that stock in 1874 at a price below its present market value. It is indeed possible that such a power may be exercised by the government, but it is by no means certain that it will be so. An investment in East India stock is undoubtedly exposed to the contingency. But on the other hand the Court is asked to perpetuate the injury done to the appellant, an injury certain and present,

and one which will endure during her life, and from which there will be no means of escape ; because, as it is said, it ought not to incur the possible chance of some loss being sustained by the persons entitled in remainder expectant upon the death of the annuitant. I should not hesitate, did special circumstances require it, to decline to accede to the latter argument. But in the present case no benefit will accrue from an immediate direction for investment, either in bank stock or East India stock. Let, therefore, the matter stand over till the second day of Hilary Term, and let an effort be made in the interval to find some eligible mortgage security. If the effort fails, it will remain to consider whether the difference in the income between the dividends of East India stock and those of bank stock ought to induce the Court to prefer the former ; and if it ought, I shall not hesitate to act accordingly, and to direct the conversion of this fund into East India stock.

1864. January 12.

The cause coming into the paper again on this day accordingly, and no mortgage security having been found * 181 in the interval, his Lordship affirmed the decree of the Court below so far as it declared that the appellant was not entitled to payment of the arrears of her annuity out of the *corpus* of the fund, directed the taxation and payment of the costs, other than those of the trustee who had severed from his co-trustees, out of the consols in Court, and ordered the sale of the residue, and the reinvestment of the proceeds in East India stock in trust in the cause, the appellant's 500*l.* annuity to be paid out of the interest during her life, or if not sufficient the whole of the interest to be paid to her, and the order to be without prejudice to any question as to the rights of the trustees of the Reversionary Interest Society to claim specifically as between themselves and the executors of Edward Horlock Mortimer the sum of consols purchased by the society.

February 13.

A question having arisen upon drawing up the order as to whether his Lordship intended it to express any thing as to the arrears of the appellant's annuity, and the payment thereof,

Mr. *Waller* mentioned the matter again to the Court with the consent of all parties.

The Lord Chancellor said that the appellant was entitled to the income of the fund from the date of its reinvestment; but that he should hesitate without having heard counsel for the other persons interested to make any order respecting payment to the appellant of arrears of her annuity accrued prior to the date of the order.

* In the Matter of JOHN ADAMS, an alleged Lunatic. * 182

1864. January 13. Before the Lord Chancellor Lord WESTBURY.

The word "property" in the Lunacy Regulation Act, 1862 (Stat. 25 & 26 Vict. c. 86), § 12, which empowers the Lord Chancellor to make a summary order for rendering the property of an alleged lunatic available for his maintenance, where such property does not exceed 1000*l.*, means beneficial property, or property clear of debt, and in a case where this did not satisfactorily appear to be the case, a reference was directed to the master in lunacy to inquire whether the fact was as stated, and also whether a proposed compromise affecting part of the property was proper to be carried into effect.

MR. W. W. MACKESON, in consequence of a difficulty felt by one of the Lords Justices, and with their sanction, applied to the Lord Chancellor under the summary jurisdiction conferred by the 12th and 13th sections of the Lunacy Regulation Act, 1862, (*a*)

(*a*) Stat. 25 & 26 Vict. c. 86. The following are the sections in question:—

Sect. 12. "Where, by the report of one of the masters in lunacy or of the commissioners in lunacy, or by affidavit or otherwise, it is established to the satisfaction of the Lord Chancellor intrusted as aforesaid that any person is of unsound mind and incapable of managing his affairs, and that his property does not exceed one thousand pounds in value, or that the income thereof does not exceed fifty pounds per annum, the Lord Chancellor intrusted as aforesaid may, without directing any inquiry under a commission of lunacy, make such order as he may consider expedient for the purpose of rendering the property of such person, or the income thereof, available for his maintenance or benefit, or for carrying on his trade or business: Provided nevertheless, that the alleged insane person shall have such personal knowledge of the application for such order as aforesaid as the Lord Chancellor shall by general order to be made as after mentioned direct."

Sect. 13. "For the purpose of giving effect to any such order as is mentioned in the last preceding section the Lord Chancellor intrusted as aforesaid may order any land, stock, or other property of such person as aforesaid to be sold, charged by way of mortgage, or otherwise disposed of, and a conveyance, trans-

* 183 * for an order rendering the property of the alleged lunatic available for his maintenance, and sanctioning a compromise with reference to certain claims upon part of it.

The gross value of the alleged lunatic's property admittedly exceeded the limit of 1000*l.*, within which the summary jurisdiction is confined by the statute; but it was contended that all debts and incumbrances ought to be deducted, and that upon a computation made the net value fell short of 1000*l.*, and the Court was asked to sanction a compromise of the incumbrances on the footing of that computation.

It was further contended that under the words "by affidavit or otherwise," in the 12th section of the Act, the Court could satisfy itself by an inquiry whether the property did not exceed 1000*l.*, and that if it was found that the property was less than 1000*l.* the summary jurisdiction attached.

The Lord Chancellor said that the difficulty felt by one of the Lords Justices (Lord Justice TURNER), as stated by the registrar, was not as to the propriety of making a deduction in calculating the value of the alleged lunatic's property, but arose from the case being of so complicated a nature as the present was, and requiring valuations and accounts of debts for the purpose of

* 184 * determining whether the matter was within the summary jurisdiction given by the Act at all, but which valuations and accounts the Court had no jurisdiction to direct unless the matter was within the Act. A further difficulty was as to the power of the Court under the statutory jurisdiction to sanction the proposed compromise.

fer, charge, or other disposition thereof to be executed or made by any person on his behalf, and may order the proceeds of any such sale, charge, or other disposition, or the dividends or income of such land, stock, or property, to be paid to any relative of such insane person, or to such other person as it may be considered proper to trust with the application thereof, to be by him applied in the maintenance or for the benefit of the insane person, or of him and his family, either at the discretion of such relative or person, or in such manner, and subject to such control, and with or without such security for the application thereof, as the Lord Chancellor intrusted as aforesaid may direct; and for the purpose above mentioned the Lord Chancellor intrusted as aforesaid shall have all the same powers with respect to the transfer, sale, and disposition of, and otherwise respecting, the real and personal property of such person as aforesaid as if he had been found lunatic by inquisition."

Mr. John Edwards appeared for the next of kin.

The Lord Chancellor held the word "property," as used in § 12 of the Act, to mean beneficial or clear property, — property clear of debts; and referred it to one of the masters in lunacy to inquire whether the alleged lunatic's property in the present case did or did not in fact exceed 1000*l.*, and whether it was for his benefit that the compromise to which the petition referred should be carried into effect.

1863. November 10, 12, 13. 1864. January 15. Before the Lord Chancellor Lord WESTBURY.

To imply a grant or reservation of an easement as arising upon the disposition of one of two adjoining tenements by the owner of both, where the easement had no legal existence anterior to the unity of possession and is not one of necessity, is a theory in part not required by, and in other part inconsistent with, the principles of English law that regulate the effect and operation of grants of real property.

If the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant; and the operation of a plain grant not pretended to be otherwise than in conformity with the contract between the parties ought not to be limited and cut down by the fiction of an implied reservation.

The grantor cannot derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor.

The comparison of the disposition of the owner of two tenements to the *destination du père de famille* of the French Code Civil is a fanciful analogy from which rules of law ought not to be derived.

Where the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to any relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership.¹

¹ See *Carbrey v. Willis*, 7 Allen, 364; *Leonard v. Leonard*, 7 Allen, 277; *Randall v. McLaughlin*, 10 Allen, 366; *Philbrick v. Ewing*, 97 Mass. 133;

Pyer v. Carter, 1 H. & N. 916, not followed.²

A dock and an adjoining strip of land and coal wharf were held in fee by the same person, and whenever a ship of any size was taken into the dock to be repaired her standing bowsprit projected over and across the adjoining strip of land. All the properties were put up for sale by auction under particulars of sale which stated that the dock was capable of holding two vessels of large size, and that at low water several vessels or a steamer of the largest class would safely lie on the ways for repairs; and wherein the strip of land was described as a "freehold coal wharf" capable of being rendered worth a very large rental by a comparatively small outlay; but nothing was stated to show that the dock or its owners either then had or were intended to have any right or privilege over the adjoining premises. The strip of land and coal wharf were sold and conveyed to the purchaser in fee absolutely and in the most unqualified manner, and under such purchaser the defendant claimed. Afterwards the dock was sold and conveyed to the purchaser thereof, under whom the plaintiff claimed. *Held*, on a bill filed for an injunction to restrain the defendant from preventing or interfering with the plaintiff's full use and enjoyment of the dock as the same had theretofore been used by allowing the bowsprit of any vessel in the dock to overlie or overhang the strip of land and coal wharf, and reversing the decision of the Master of the Rolls, that —

1. There was no legal ground for holding that the owner of the dock retained or had, in respect of that tenement, any right or easement over the adjoining tenement of the strip of land and wharf after the sale and alienation of the latter:
2. The purchaser or grantee of the wharf was not to be considered as having been bound to know, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, or as having bought with notice of this necessary use of the dock and the absolute sale and conveyance to him was not to be cut down or reduced accordingly:

Oliver v. Pitman, 98 Mass. 46; *White v. Chapin*, 12 Allen, 518; *Parker v. Bennett*, 11 Allen, 388; *Johnson v. Jordan*, 2 Cush. 234; *Thayer v. Payne*, 2 Cush. 327; *Dunklee v. Wilton Railroad Co.*, 24 N. H. 489; *Warren v. Blake*, 54 Maine, 276; *Crossley v. Lightowler*, L. R. 2 Ch. Ap. 486; *Mullen v. Stricker*, 19 Ohio St. 135; *Butterworth v. Crawford*, 46 N. Y. 349; *Simmons v. Cloonan*, 2 Lansing (N. Y.), 346; *Morland v. Cook*, L. R. 6 Eq. 252, 263, 265; *Russell v. Harford*, L. R. 2 Eq. 507; *Davies v. Sear*, L. R. 7 Eq. 427; *Potts v. Smith*, L. R. 6 Eq. 311; *Brakely v. Sharp*, 1 Stockt. (N. J.) 9; *Morrison v. Marquardt*, 24 Iowa, 35; *Providence Tool Company v. Corliss Steam Engine Company*, 9 R. I. 564; *Evans v. Dana*, 7 R. I. 306; *Angell Watercourses* (6th ed.), §§ 166 a-166 v; 1 *Sugden V. & P.* (8th Am. ed.) 24 n. (I.), 58 n. (o¹), 743 n. (t); *Washb. Easements* (2d ed.), 41, 54, 130, 386, 618 *et seq.*

² For cases which give countenance to the doctrine of *Pyer v. Carter*, see *Lampman v. Milks*, 21 N. Y. 507; *Curtiss v. Ayrault*, 47 N. Y. 73; *Roberts v. Roberts*, 7 Lansing, 55; *Seymour v. Lewis*, 2 Beasley (N. J.), 439; *Fetters v. Humphreys*, 3 C. E. Green (N. J.), 260; *Simmons v. Cloonan*, 2 Lansing (N. Y.), 346; *Janes v. Jenkins*, 34 Md. 1; *Butterworth v. Crawford*, 3 Daly, 97; *Watts v. Kelson*, L. R. 6 Ch. Ap. 166.

8. The easement claimed by the plaintiff was neither "continuous," "apparent," nor "necessary."

As to what might have resulted had the dock been the property first sold, and had it been conveyed with all privileges, easements, rights, and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal wharf, *quære*.

THIS was an appeal by the defendant from a decree of the Master of the Rolls, whereby his Honor granted without costs a perpetual injunction restraining the appellant * from pre- * 186 venting or interfering with the full use and enjoyment of the dock herein after referred to by the plaintiffs in the manner the same had theretofore been used, by allowing the bowsprit of any vessel in the plaintiffs' dock to overlie or overhang a certain specified portion, to be marked out by metes and bounds, of the appellant's wharf, also herein after referred to, with liberty to apply.

The plaintiffs were respectively the owners in fee and lessee of a dock situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels.

The appellant was the owner in fee of a strip of land and coal wharf adjoining the dock, on which he had begun to build a warehouse.

The plaintiffs filed the bill in this suit for an injunction to restrain such building, on the ground that when their dock was occupied by a vessel of large size, her bowsprit must project over the boundary fence of the dock, across the appellant's premises, which it could not do if the appellant's building should be erected, and that they had a right to restrain such building, because it would deprive them of an easement or privilege which * they were entitled to use or exercise over the land of * 187 the appellant.

The plaintiffs put their case upon possession and enjoyment of the privilege claimed by them of sufficient duration to create a legal title. The Master of the Rolls decided, and in the judgment of the Lord Chancellor (from whose judgment the present statement of the facts is in the main taken) correctly, that the plaintiffs had not proved a possession or enjoyment sufficient to create a legal title to an easement; but his Honor nevertheless granted an injunction in the terms above stated.

Shortly stated, the facts of the case were as follows: —

From the year 1841 until the month of June, 1845, a person named Knox was the owner in fee, and also the occupier, both of the dock and of the adjoining strip of land and coal wharf; and the evidence proved that during such period whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across the adjoining strip of land.

In the month of June, 1845, the two properties, the dock and the strip of land and coal wharf, were put up for sale by Knox by public auction.

In the description given in the particulars of sale, it was stated that the dock was capable of holding two vessels of large size, and that at low water several vessels, or a steamer of the largest class, could safely lie on "the ways" for repairs.

The strip of land described and sold as a "freehold coal wharf" was stated to be capable of being rendered worth a very * 188 large rental by a comparatively small * outlay. It was represented, therefore, as an improvable property, and nothing was stated to show that the dock or its owners either then had, or were intended to have, any right or privilege over the adjoining premises.

At the auction, the strip of land and coal wharf were sold to one Gibson, and by the conveyance, which was dated in July, 1845, the vendor (who, at the execution of the deeds, still remained owner of the dock) conveyed the strip of land and coal wharf to the purchaser, under whom the appellant claimed, in the most unqualified manner in fee-simple, "together with all privileges, easements, and appurtenances to the premises belonging, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of the vendor, in, to, or out of the same hereditaments and premises, and every part thereof." The dock was afterwards sold and conveyed to other persons, under whom the plaintiffs claimed.

Mr. Selwyn and *Mr. Druce* appeared for the plaintiffs, in support of the decree of the Master of the Rolls.

Mr. Baggallay, *Mr. Mellish*, and *Mr. Wickens*, for the appellant.

The nature of the arguments sufficiently appears from the Lord Chancellor's judgment.

Reference was made : —

On the part of the plaintiffs, to *Pyer v. Carter*, (a) *Hinchcliffe v. The Earl of Kinnoul*, (b) *Swanborough v. Coven-* * 189
try, (c) *Gale on Easements*, (d) *Ewart v. Cochrane*, (e)
Richards v. Rose, (g) *Pinnington v. Galland*, (h) *Riviere v.*
Bower, (i) *Hall v. Lund*. (k)

And on the part of the appellant, to *Gale on Easements*; (l)
White v. Bass, (m) as overruling the remarks in *Gale*, p. 33,
which impugn Lord HOLT's decision in *Tenant v. Goldwin*, (n) and
as relating to discontinuous and non-apparent easements, in which
category it was contended that the easement claimed in the present
case fell; *Pyer v. Carter*, (a) as showing what is meant by an
apparent easement; and *Worthington v. Gimson*, (o) *Pearson v.*
Spencer, (p) *Dodd v. Burchell*, (q) and *Polden v. Bastard*, (r) as
explaining and distinguishing *Pyer v. Carter*; (a) and for special
comparison with *Polden v. Bastard*, (r) *Nicholas v. Chamber-*
lain, (s) as a case (amongst others) showing that the owner of
the two properties, while they were unsevered, must have made
some actual construction giving a benefit to the owner of the
dominant tenement. Reference was also made to *Beaudely v.*
Brook, (t) *Packer v. Wellsted*, (u) *Howton v. Frearson*, (v) *Holmes*
v. Goring, (w) *Proctor v. Hodgson*, (x) *Morris v. Edgington*, (y)
Jones v. Tapling. (z)

* At the conclusion of the arguments, the Lord Chan- * 190
cellor reserved his judgment.

(a) 1 H. & N. 916.

(b) 5 Bing. N. C. 1.

(c) 9 Bing. 305.

(d) Ed. 3, pp. 85, 87, 99, 100.

(e) 4 Macq. 117.

(g) 9 Exch. 218.

(h) 9 Exch. 1.

(i) 1 Ry. & Moo. 24.

(r) 4 B. & S. 258; afterwards affirmed in the Exch. Cham. L. R. 1 Q. B.
156.

(s) Cro. Jac. 121.

(t) Cro. Jac. 189.

(u) 2 Sid. 39, 111.

(v) 8 T. R. 50.

(z) 12 C. B. (N. S.) 826; S. C. on appeal, 11 H. L. Cas. 290.

(k) 1 H. & C. 676.

(l) Ed. 3, pp. 20, 82.

(m) 7 H. & N. 722.

(n) 2 Ld. Raym. 1089.

(o) 2 El. & El. 618.

(p) 1 B. & S. 571.

(q) 1 H. & C. 113.

(w) 2 Bing. 76.

(x) 10 Exch. 824.

(y) 3 Taunt. 24.

1864. January 15.

The Lord Chancellor, after stating the nature and the facts of the case to the effect of the statement herein before contained, proceeded as follows :—

The conveyance of the coal wharf, therefore, is the grant of a person who was at that time absolute owner of the dock, in respect of the ownership of which the present right is now claimed by his grantees against the coal wharf, and it is very difficult to understand how any interest, right, or claim in, over, or upon any part of the coal wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior, absolute, and unqualified grant that was so made of the coal wharf premises to the purchaser.

Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property.

It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If

this plain rule be adhered to, men will know what they
 • 191 have to • trust, and will place confidence in the language of their contracts and assurances.

But this view of the case is not that taken by his Honor the Master of the Rolls.

In the note which has been furnished me of his Honor's judgment, his Honor is represented as saying : "The ground on which I think he (the defendant) cannot contest this right in the plaintiff is, because I think that such projection of the bowsprit from the vessel in the dock is essential to the full and complete enjoyment of the dock as it stood at the time when he, or rather Gibson under whom he claims, purchased the wharf, and that Gibson and he had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also

because the fact was patent and obvious to any one, on the ground that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the wharf which I have pointed out." And again: "If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore, and my opinion is that this projection of the bowsprit is necessary for the due enjoyment of the dock in the ordinary sense of that term."

The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee-simple of one of those tenements, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed * as may be requisite for the enjoyment of * 192 the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine; I believe it to be of very recent introduction; and it is in my judgment unsupported by any reason or principle, when applied to grants for valuable consideration.

That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee-simple of his tenement, and has it conveyed to him without any reservation. To limit the vendor's contract and deed of conveyance by the vendor's previous mode of using the property sold and conveyed, is inconsistent with the first principles of law, as to the effect of sales and conveyances.

Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it on which he has been for years in the habit of throwing out the cinders, dust, and refuse of his workshops, which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for the full enjoyment of the manufactory; and suppose that I, being desirous of extending my garden, purchase this piece of land and have it conveyed to me in fee-simple; and the owner of the manufactory afterwards sells the manufactory to another person; am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of

the judgment before me, I certainly am so subject; for the case falls strictly within the rules laid down by his Honor, and it reduces them to an absurd conclusion.

* 193 * The first introduction of this extraordinary doctrine appears to have been made in the following manner: —

A learned and ingenious author, the late Mr. Gale, published, in the year 1839, a work of great merit on this subject of easements, in which he derived from the doctrine of the French Code Civil certain rules with which he conceived that the law of England agreed, and inasmuch as these conclusions have been cited with approbation in some recent cases at common law, and as they form the principal support of the plaintiff's argument, it is right to state and examine them.

Mr. Gale, in the opening of his 4th chapter (a), says: —

“The implication of the grant of an easement may arise in two ways: 1st, upon the severance of an heritage by its owner into two or more parts; and, 2dly, by prescription. Upon the severance of an heritage a grant will be implied, 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have had no legal existence as easements: and, 2dly, of all those easements without which the enjoyment of the severed portions could not be had at all.”

It will be observed that the learned author is not here speaking of easements which are already legally existing before the unity of possession, but of those which he supposes to arise for the first time by implication from the grant.

* 194 If nothing more be intended by this passage than to * state, that on the grant by the owner of an entire heritage of part of that heritage, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness; but it seems clear that the learned writer uses the word “grant” in the sense of reservation or mutual grant, and intends to state that where the owner of the entirety sells and

(a) Page 81, ed. 3.

grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold part of the heritage during the unity of possession. This is clearly shown by what is subsequently laid down that it is immaterial which of the two tenements is first granted, whether it be the *quasi dominant* or *quasi servient* tenement.

But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor.

Consider the easements as if they were rights, members, or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of any thing abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner.

* Many rules of law are derived from fictions, and the * 195 rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany such portions when divided among them, or even as it is used in French law, when aliened to strangers.

But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership.

And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer v. Carter*, (a) one of the two cases on which the Master of the Rolls relies.

In *Pyer v. Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without reservation, and he subsequently sold and conveyed the remaining house to * 196 another person. It appeared * that the second house was drained by a drain that ran under the foundation of the house first sold; and it was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned Judges, the first purchaser takes the house "such as it is." But with great respect, the expression is erroneous, and shows the mistaken view of the matter; for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not "such as it is," but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the Court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is whether he was under any obligation to make inquiry, or would be affected by the result of it; which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer v. Carter*, the true conclusion was, that as between the purchaser and the vendor the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority.

But to the earlier cases cited by the Court in *Pyer v. Carter* as authorities for its decision there can be no objection.

* 197 In *Nicholas v. Chamberlain* (b) it was decided that * if the owner of a house, being also owner of the land surrounding it, make a conduit through part of the land to the house, and then sells the house with its appurtenances, the right to the conduit passes; that is to say, the Court held that the conduit was a thing appertaining to the house, and as such passed under the convey-

(a) 1 H. & N. 916.

(b) Cro. Jac. 121.

ance; and in the same case it was also decided, that if the owner sell the land, reserving the house, the right to the conduit is reserved; a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances.

To this case, and to the case in the Year Book of the 11th of Henry VII., (a) or the case of *Sury v. Pigott*, (b) there can be no objection, but they do not give any support to the decision in *Pyer v. Carter*.

The other case relied on by his Honor, namely, *Hinchcliffe v. The Earl of Kinnoul*, (c) is of a different character, and does not apply to the question of easements reserved by implication or the grant of the *quasi servient* tenement. In that case, there being two adjoining houses belonging to the same lessor, it appeared that the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses of the first house with its appurtenances carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot; a decision which rests upon the ordinary principle of law, that if I grant a tenement for valuable consideration I also grant a right of way to it through
 *my land, if such way be absolutely necessary for the en- *198
 joyment of the thing granted.

This case might have had some application to the present if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights, and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal wharf; but it is plain that no easements can arise by the necessary operation of a grant, unless it be in the power of the grantor to give such easements.

It is true that there may be two tenements, as, for example, two adjoining houses, so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour; in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he

(a) 25 Pl. 6; *Coppy v. J. de B.*

(c) 5 Bing. N. C. 1.

(b) *Palmer*, 444.

retains, that support from the house sold which is at the same time afforded in return by the former to the latter tenement (which was the case of *Richards v. Rose*; (a)) but where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed, and either passed or extinguished by the grant.

It must be always recollected that I have been speaking throughout of cases where (as in the present case) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of
* 199 both; which is * in my opinion an ingenious but fanciful theory, which is, as to part, not required by, and is as to the other part wholly inconsistent with, the plain and simple principles of English law that regulate the effect and operation of grants of real property.

There is in my judgment no possible legal ground for holding that the owner of the dock retained or had in respect of that tenement any right or easement over the adjoining tenement of the strip of land and coal wharf after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which his Honor's decree is founded, that the purchaser and grantee of the coal wharf must have known, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, and that he must be considered, therefore, to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly. I feel bound, with great respect, to say that in my judgment such is not the law.

But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plaintiff is not "continuous," for that means something the use of which is constant and uninterrupted; neither is it "an apparent easement," for except when a ship is actually in the dock with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it a "necessary easement," for that

(a) 9 Exch. 218.

means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all.

But this is irrelevant to my decision, which is founded
 * on the plain and simple rule that the grantor, or any per- * 200
 son claiming under him, shall not derogate from the absolute sale and grant which he has made.

Therefore I must reverse the decree of the Master of the Rolls, and dissolve the injunction he has granted, and dismiss the plaintiff's bill with costs.

In the Matter of The JOINT-STOCK COMPANIES ACTS, 1856
 and 1857.

In the Matter of The SOUTHAMPTON, ISLE OF WIGHT,
 AND PORTSMOUTH IMPROVED STEAM BOAT COM-
 PANY LIMITED.

BIRD'S CASE.

1863. July 31. 1864. January 20. Before the Lord Chancellor Lord WEST-
 BURY.

A director of a company applied for and subscribed an agreement to take additional shares. He was entered upon the register in respect of the additional shares, but none were ever actually allotted to him. The company being wound up: *Held*, that his name was properly on the register, and ought also to be placed upon the list of contributories for such additional shares, notwithstanding his allegation that he had applied for and subscribed the agreement to take the additional shares as the agent only for another person; there being no evidence that at the time of his application and subscription he had communicated the alleged fact to the company.

THIS was an appeal by the official liquidators of the Southampton, Isle of Wight, and Portsmouth Improved Steam Boat Company Limited, a company which was being wound up under the above-mentioned Acts in the Court of Mr. Commissioner FANE, from an order of his Honor dated the 22d of July, 1863, which directed the insertion of the name of the respondent James Binfield Bird in the list of contributories, in respect of thirty-seven shares in the company only, although that gentleman appeared in the register of shareholders as the holder of eighty-seven shares.

* 201 * On the appeal being opened and the last-mentioned fact appearing. —

The Lord Chancellor, referring to *Birch's Case*, (a) *Whittet's Case*, (b) and *Fox's Case*, (c) directed the appeal to stand over, to come on before his Lordship, together with an original motion to be made by Mr. Bird in Chancery under the Joint-Stock Companies Act, 1856, § 25, for the rectification of the register, by erasing therefrom the name of Mr. Bird as the holder of eighty-seven shares, and the insertion therein of his name as the holder of thirty-seven shares.

1864. January 20.

The appeal motion in bankruptcy and the original motion in Chancery accordingly came on to be heard together on this day, when the facts of the case appeared to be as follows:—

Mr. Bird, a director of the company, held thirty-seven paid-up shares therein, and was the general agent of a Mr. Ward, who was another shareholder in the company, and a landowner whose property was deemed likely to benefit by the running of the company's boats.

Towards the close of the year 1861 the following undertaking with reference to a new issue of shares by the company was signed by, among other persons, Mr. Bird; viz., "The Southampton, Isle of Wight, and Portsmouth Improved Steam Boat Company Limited. We, the undersigned shareholders in the above company, hereby undertake to increase the number of shares held by us to the amount set opposite our respective names on condition that the total additional subscription is not less than 10,000*l*."

* 202 * Mr. Bird's subscription was for fifty additional shares of the value of 500*l*. He had previously applied by letter for these shares, but the application, as also the subscription, contained nothing to show that either was made or signed by Mr. Bird otherwise than on his own account. Nor was there any thing to show that he stated to the company at the time that he was only acting as the agent of Mr. Ward in the matter.

On the 28th of March, 1862, Mr. Bird, — referring to the fact that Mr. Ward had in the interval subscribed the undertaking for one hundred additional shares of the value of 1000*l*., for which Mr.

(a) 2 De G. & J. 10.

(c) 3 De G., J. & S. 465.

(b) 2 De G. & J. 577.

Bird, by Mr. Ward's direction, had paid — wrote thus to Mr. Rawlins, the secretary of the company: "In case there should be a mistake as to the 500*l.*, I signed for Mr. Ward and subject to his approval, and as he did not consent thereto I will thank you to take out the same from the 10,000*l.* additional subscription list, and as two of the directors ultimately obtained from him 1000*l.* this will be inserted instead of the 500*l.* above referred to. Please tell me that you have corrected this." And again, on the 10th of April, 1862, thus: "Did you alter the 500*l.* as requested by me in my last?" As a matter of fact, Mr. Bird's name was entered in and never erased from the books of the company as the holder of the fifty additional shares for which he had applied and subscribed; but beyond that fact there was no evidence of any allotment to him of such shares. Mr. Bird deposed that he only agreed to take them as the agent of Mr. Ward, and that he had, immediately upon finding, from applications made to him, that he was considered to have taken them on his own account, repudiated any intention of so doing, especially as Mr. Ward had in the interval himself subscribed for one hundred additional shares.

*The order under which the company was being wound * 203
up was made on the 1st of November, 1862.

Mr. Daniel and *Mr. Higgins*, for Mr. Bird, argued that upon the evidence it was clear that he had subscribed the undertaking as to the new shares only as the agent of Mr. Ward. He was known to fill that position, his letters were directed from "The Ward Estate Office," and the company had dealt with him in this particular matter as such. They never repudiated the demands contained in his letters of March and April, 1862; but acceding thereto and accepting Mr. Ward's subscription for one hundred additional shares as a satisfaction of Mr. Bird's application, had never allotted to the latter the fifty new shares applied for by him, or sought to make him prior to the winding up in any way liable in respect of them.

Mr. Bacon, *Mr. Bagley*, and *Mr. Waller*, for the official liquidators, were not called upon.

THE LORD CHANCELLOR. — It is impossible to relieve this gentleman, regard being had to his own evidence in the case.

Had his case been that, at the time when he subscribed the agreement to take additional shares, he represented that he intended to take those shares only as the agent of Mr. Ward, an equity might have arisen in his favour. But it would have been essential to the existence of that equity that notice should have been given to the company of those shares having been taken by him on behalf of another person. As a fact, there is no evidence whatever that Mr. Bird told the company that in subscribing the

agreement for additional shares he was acting as the agent
* 204 of Mr. Ward. That a man * should subscribe an agreement of that sort having a secret intention of subscribing as an agent is one thing; to communicate the fact of agency at the time of his subscription to the company to whom he applied, by whom his name was received, and by whom reliance is placed on that subscription, is quite another thing. As a matter of fact, the subscription of Mr. Bird, who stood in such a relation towards the company as rendered it especially incumbent on him to explain exactly the terms on which he proposed to become a holder of additional shares, was not in any sense that of Mr. Ward, but was such as that the company were—at any rate are, now that they have become insolvent—entitled to take it as the unqualified signature which, on the face of it, it appears to be. The documents in the case are consistent with the expressed intention; and a secret intention on the part of Mr. Bird—if such existed—cannot be permitted to control or nullify his own acts.

He must be put upon the list of contributories for the whole eighty-seven shares.

* In the Matter of JAMES STANFORD BOYCE, a Per- * 205
son of unsound Mind not found so by Inquisition ;

And in the Matter of the Trusts of the Will of WILLIAM
BLACKWOOD, deceased ;

And in the Matter of The TRUSTEE ACTS, 1850 and 1852 ;

And in the Matter of The ACT FOR THE RELIEF OF SUIT-
ORS OF THE COURT OF CHANCERY.

1864. January 21. February 18. Before the Lord Chancellor Lord WEST-
BURY.

A testator appointed his wife executrix and A. executor and trustee of his will. He devised his real estate to his wife during her life or widowhood, but in case she should marry again he gave her, by way of legal limitation, an annuity out of his realty, with the usual powers of entry, distress, and sale ; and directed his trustee to invest and accumulate the surplus of the rents and profits of his real estate, and on the death of his wife to sell the real estate, with power to execute such instruments and assurances as might be requisite for effecting the sale. The will contained a power to appoint new trustees in place of any trustee dying or becoming unwilling or unable to act. The donee of this power having died, and the original trustee having become of unsound mind, although not so found by inquisition :
Held, —

1. That new trustees might be appointed under the Trustee Act, 1850, § 32, with a vesting order of such estate (if any) as was vested in the original trustee.
2. That under the limitations of the will the trustee took a contingent estate *pur autre vie* during the life of the widow, in the event of her subsequent marriage ; and *semble*, that he also took an estate in remainder in fee expectant on the cesser of the widow's prior estate.
3. That the order for the appointment of the new trustees and the vesting order should be drawn up in Chancery as well as in lunacy.

Observations on the requisites to bring a case within the provisions of the Trustee Act, 1850.

THIS was a petition presented in lunacy and in the above matters, seeking the appointment of new trustees of the will of William Blackwood, in the place of James Stanford Boyce, the original trustee thereof (who had become of unsound mind, but had not been so found by inquisition), and a vesting order.

The petition was presented by the beneficiaries under the will, and was heard by the Lord Chancellor, at the request of the Lords Justices, before whom it had been originally set down.

The testator, by his will made in 1851, appointed his wife
 * 206 executrix and James Stanford Boyce to be the * executor and trustee of his will, and directed the payment of his debts, as soon as conveniently might be after his decease. He then devised all and every his messuages, lands, tenements, hereditaments, and real estate whatsoever and wheresoever to his wife and her assigns for her life in case she continued his widow, she keeping the same in tenantable repair and the buildings thereof insured; but in case his said wife should marry again, then he gave and devised all such messuages, lands, tenements, hereditaments, and real estate to the use and intent that his said wife and her assigns should receive during her life an annuity of 20*l.*, payable as therein mentioned, with the usual powers of entry, distress, and sale, in favour of his wife. The testator then directed his said trustee to invest the surplus (if any) of the rents and profits of his said hereditaments and real estate which should be remaining after payment of the said annual sum and the expenses of keeping the same hereditaments and real estate in tenantable repair, and the buildings thereof insured from loss or damage by fire, in or upon any of the public stocks, funds, or securities of the United Kingdom, or any real securities in England or Wales, but not in Ireland, or elsewhere, and improve the same as an accumulating fund, varying the investment from time to time. And on the decease of his said wife he directed his said trustee to sell his said messuages, lands, tenements, hereditaments, and real estate, together or in parcels, by public auction or private contract, at such place and time and subject to such stipulations relative to the title or to the evidence of title, or to the payment of the purchase-money, or to any other matters connected with the sale, as his said trustee should judge expedient or as his counsel should advise, with full discretion and authority to sell either subject to or discharged from or with an indemnity, by impounding part of the purchase-money or otherwise, against any incumbrances;
 * 207 and also * to fix a reserved bidding and buy in any lot or lots at any auction, and to rescind or vary any contract for sale without being liable for any consequential loss; and also to execute such instruments and assurances as should be requisite

for effecting and completing the sale of his said hereditaments and real estate ; and the money arising from such sale or sales, after paying thereout the expenses attending the same sale or sales and of all necessary acts on the part of the vendor for the completion of the title to the same hereditaments and real estate, he directed to be received by his said trustee and held by him, together with the accumulation (if any) of the said surplus rents and the money to arise from the sale of his (the testator's) household furniture and effects, the use whereof was therein after given to his said wife for her life, upon trust to pay and he thereby bequeathed the same respectively unto and among such of his nephews and nieces as should be living at the decease of his said wife in equal shares and proportions as tenants in common if more than one ; and if but one, then the whole thereof respectively to such one.

The will in statement also contained a power for the appointment of new trustees in the form of a declaration by the testator, that if his said trustee or any trustee or trustees to be appointed under that provision should die or become unwilling or unable to act as trustee or trustees of his will, it should be lawful for testator's said wife to appoint any fit person or persons to be a trustee or trustees in the place of any trustee or trustees dying or becoming unwilling to act ; and to this was added a further declaration, that the trustee or trustees for the time being of his will should be competent to exercise all the powers and discretions thereby confided to the trustee therein named.

The testator's widow survived him and died without having married again, and without having exercised the * power * 208 of appointing new trustees vested in her under the will. New trustees were required in order that the real estate might be sold in pursuance of the directions of the will.

Mr. Cory appeared in support of the petition.

Reference was made to *Ex parte Mornington*, (a) and to The Trustee Act, 1850, and The Trustee Extension Act, 1852. (b)

The Lord Chancellor reserved his judgment.

(a) 4 De G., M. & G. 537.

(b) The sections of these Acts, viz., 13 & 14 Vict. c. 60, § 32, and 15 & 16 Vict. c. 55, § 9, referred to during the argument, are as follows :—

Trustee Act, § 32. “ And be it enacted, that whenever it shall be expedient

January 25.

The Lord Chancellor, after stating the testator's will, and remarking that the direction therein contained to the trustee to invest the surplus of the rents and profits which should be remaining after payment of the contingent annuity to the testator's wife would give to the trustee an estate enough in point of quantity to enable him to carry the trusts of the will into effect, viz., a contingent estate *pur autre vie* during the life of the widow in the event of her subsequent marriage, proceeded as follows : —

It is unnecessary to consider whether the language of
 * 209 * the will is sufficient to give to the trustee an estate by implication, although the inclination of my opinion is that the language of the will is sufficient to create a trust to sell and convey ; and had the trust been actually so expressed, the trustee would, I apprehend, have taken a remainder in fee in the testator's real estate expectant on the cesser of the widow's prior estate.

But assuming the trustee to take merely a power to sell the real estate, his position under the will is this : he is appointed trustee ; he is directed peremptorily to sell the testator's real estate on the widow's death ; he is empowered to give effect to that sale by the execution of all necessary conveyances. In other words, three things are combined in his person under the language of the will ; namely, the office of trustee, a personal obligation, and a power of fulfilling and discharging that obligation. Where these three things concur, the case in my judgment falls within the statute, and the Court has jurisdiction thereunder to appoint a new trustee.

In fact, even with the simple office of a trustee, the case would, in my judgment, be within the Statute of 1850, if the Court thought

to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees."

Trustee Extension Act, § 9. " That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order."

fit to exercise the discretionary power vested in it under the 32d section. [His Lordship read the section and proceeded thus:] Under the will before me, the testator contemplates the probability of a new trustee being required, and gives a power which, in consequence of the death of the widow, cannot be exercised. Inasmuch, therefore, as, owing to the insanity of the trustee, the case has arisen for the appointment of new trustees, and unless that is done the real estate cannot be sold, I think it "expedient" within the language of the section to appoint new trustees, and it is also within the same language "impracticable so to do without the assistance of the Court of Chancery." The case falls distinctly within the statute.

* Regard, however, being had to the language in which * 210 the statutory powers vested in me sitting in lunacy are conferred, (a) my order in this case had better be drawn up as well in Chancery as in Lunacy, and it will be for the appointment of new trustees in substitution for the original trustee in the terms of the prayer of the petition, with an order vesting in them such estate (if any) as was vested in the original trustee. (b)

(a) See the Trustee Act, 1850, § 3, and the Trustee Extension Act, 1852, § 10, which respectively provide as follows:—

Trustee Act, 1850, § 3. "And be it enacted, that when any lunatic or person of unsound mind shall be seised or possessed of any lands upon trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign-manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons, in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

Trustee Extension Act, 1852, § 10. "In every case in which the Lord Chancellor, intrusted as aforesaid, has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in Chancery as well as in Lunacy, or be passed and entered by the Registrar of the Court of Chancery."

(b) The order in this case, which was drawn up in Lunacy and in Chancery will, as drawn up in Chancery, be found in Reg. Lib. 1864, A. 402. Amongst its recitals was the following: "And it appearing that the said James Stanford Boyce is a person of unsound mind within the meaning of the Trustee Act, 1850, and that the petitioners are beneficially interested in the lands and *chase in action*

* 211 * **SWAINE v. THE GREAT NORTHERN RAILWAY COMPANY.**

1864. January 25, 26. Before the LORDS JUSTICES.

Occurrences of nuisance, if temporary and occasional only, are not grounds for the interference of the Court of Chancery by injunction, except in extreme cases. Therefore, where a railway company carried down to and deposited on a siding to their line manure which was occasionally not proper manure, and they occasionally allowed it to remain there longer than it ought to have remained: *Held*, in a suit by a neighbouring landowner for an injunction to restrain the nuisance and for damages, —

1. That the Court would not interfere by way of injunction.
2. That the Court would not enter into the question of damages, the case being one which, in the judgment of the Court, could be more effectually disposed of at law than in equity, and Sir HUGH CAIRNS's Act (21 & 22 Vict. c. 27) only giving the Court of Chancery jurisdiction to give damages in any case where a bill is properly filed in it,¹ while Mr. Rolt's Act (25 & 26 Vict. c. 42) does not make it compulsory on the Court so to do.

THIS was an appeal by the plaintiff from the dismissal of his bill with costs by his Honor the Vice-Chancellor WOOD.

The case made by the bill was in substance as follows : —

The appellant owned a house and land at Stevenage, which was approached by a road adjoining a siding on the respondents' railway at the Stevenage station. The siding had been constructed in 1859 on land belonging to the respondents, and it abutted on the above-mentioned road, contiguous to and fronting the appellant's property. It had originally been used by the respondents for discharging the contents of their wagons, and for some time past had been used by them for discharging from their trucks and wagons large quantities of dung and other manure, which, after being discharged, were carted away without causing any very considerable inconvenience or annoyance to the appellant.

¹ See 2 Chitty Contr. (11th Am. ed.) 1420–1424.

subject to the trusts of the said will, and that it is expedient to appoint new trustees of the said will, and that it is found impracticable so to do without the assistance of this Court." And the vesting order as to the lands was to vest them in the new trustees "for such estate (if any) therein as by the said will is vested in the said James Stanford Boyce."

The respondents had subsequently commenced the practice * of depositing and stacking the said manure and other * 212 offensive matter brought by trucks on to the siding, and allowing the same to remain so deposited or stacked for a considerable time; and at other times they had allowed the trucks to remain loaded for some weeks on the siding.

The contents of the deposited stacks or heaps of manure, or of the undischarged trucks, were stated to be different sorts of animal dung, decomposed fish, dogs, cats, and almost every species of decomposed animal matter; and the bill alleged that the consequent noisome effluvium was so bad as to render the occupation or enjoyment of the appellant's property impossible, without the greatest discomfort, inconvenience, and danger to health.

The bill proceeded to state that part of the appellant's property was occupied by himself and part by a tenant, who had given him notice to determine the tenancy unless the nuisance was abated.

The appellant, after ineffectual applications to the respondents to abate the nuisance, caused his solicitors to write to them on the same subject: and Messrs. Denton & Hall, his solicitors, wrote accordingly to the respondents on the 14th of November, 1862, complaining also of the very bad state of the only road to the appellant's house and land, caused by the excessive traffic to and from the siding, which rendered it, at times, almost impassable on foot.

A correspondence ensued between the representatives of the parties; but nothing having been done in the way of abating the nuisance, the appellant, on the 9th of * January, 1863, * 213 filed the bill in this suit, stating to the effect above mentioned, and praying:—

(1) For an injunction to restrain the respondents, their agents, servants, and workmen from using the siding in question for the deposit or stacking of dung, manure, or other compost or matter, whereby, or by reason or by means whereof, any noxious, offensive, or unhealthy fumes, vapors, or stench might be caused or produced or be emitted, or from permitting their trucks or wagons containing any such offensive matter to remain on the siding, or using the siding in such a manner as to interfere with the quiet and wholesome enjoyment by the appellant, his family and tenants, of the said house and premises:

(2) For an account of the damage which the appellant had sustained by reason of the aforesaid wrongful acts of the respondents, and payment of such amount by them :

(3) For payment by the respondents of the costs of the suit ; and

(4) General relief.

The appellant, it appeared, had taken no steps to try his right against the respondents at law, nor had he moved in the suit for an interlocutory injunction.

The Vice-Chancellor, referring to *Bateman v. Johnson*, (a) and thinking that, apart from Mr. Rolt's Act (Stat. 25 & 26 Vict. c. 42), the appellant had no *locus standi* in equity, and that that statute gave him none, and moreover that, even had it done so, his remedy was gone by laches and acquiescence, dismissed the bill with costs.

* 214 * The scope of the arguments on the present appeal, and the result of the evidence in the suit, appear sufficiently for the purpose of this report from the judgment of the Lord Justice TURNER.

Mr. Willcock and *Mr. Roxburgh*, for the appellant, referred to *Soltau v. De Held*, (b) *Semple v. The London and Birmingham Railway Company*, (c) *Walter v. Selfe*, (d) *The Imperial Gas Company v. Broadbent*, (e) *The Attorney-General v. The Sheffield Gas Consumers Company*, (g) *Gordon v. The Cheltenham Railway Company*, (h) *Wedmore v. The Mayor of Bristol*, (i) *Johnson v. Wyatt*; (k) Sir HUGH CAIRNS'S Act (Stat. 21 & 22 Vict. c. 27), and Mr. Rolt's Act (25 & 26 Vict. c. 42).

Mr. T. Stevens (*Mr. Rolt* with him), for the respondent, referred to *Bamford v. Turnley*, (l) as overruling *Hole v. Barlow*; (m) The Common Law Procedure Act, 1854 (Stat. 17 & 18 Vict. c. 125), § 79.

(a) Fitzg. 106.

(b) 2 Sim. N. S. 133.

(c) 1 Rail. Cas. 133.

(g) 3 De G., M. & G. 304 [Am. ed. note (3), and cases cited].

(h) 5 Beav. 229.

(i) 11 W. R. 136.

(k) 2 De G., J. & S. 18 [Am. ed. notes].

(d) 4 De G. & Sm. 315.

(e) 7 H. L. Cas. 600.

(l) 3 B. & S. 62.

(m) 4 C. B. (N. S.) 334.

Mr. Willcock, in reply.

THE LORD JUSTICE TURNER. — I do not think it desirable unnecessarily to decide so important a question as is one of those raised by the respondents in this case; viz., whether the jurisdiction of this Court is affected by the Common Law Procedure Act, and upon that point I give no opinion, merely saying that I am not at present inclined to accede to *Mr. Stevens's* view with reference to the point.

* But upon the facts of this case there are two points, * 215 — first, whether the appellant is entitled to an injunction; and secondly, whether, if not entitled to an injunction, he is entitled to damages in this Court.

I do not understand it to be contended that, if the manure was brought to the station in a proper manner, and was properly dealt with when there, the appellant would have a case for the interference of the Court. The case made by the bill and argued at the bar is this: first, that the manure was not proper manure; and secondly, that it was not removed from time to time as often as it ought to have been removed.

Upon the evidence, it cannot be denied that in some instances dead dogs and cats have got into this manure, — that occasionally the manure which was carried was not proper manure. Nor can it be denied that in some instances the manure has remained at the station longer than it ought to have remained. The manure is brought down; the farmer does not send for it on the day it arrives. It must be emptied out of the trucks, and deposited in some place or other.

But the real question is, whether there has been such a continued system of carrying manure of a description not proper to be carried, and therefore prejudicial to the appellant, and such a continued system of keeping manure at the station beyond the time necessary or proper for disposing of it, as to induce the Court to interfere by injunction.

With reference to this point, and adhering to the opinion expressed by both Lord CRANWORTH and myself in the case of *The Attorney-General v. The Sheffield * Gas Company*, (a) * 216 that it is not in every case of nuisance that the Court will

(a) 3 De G., M. & G. 304.

interfere by injunction ; and holding that occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this Court by injunction, except in extreme cases, there is not in my judgment here a sufficient case for such interference.

Then, as to the question of damages, a question which we had to consider also in *Johnson v. Wyatt*. (a)

The law upon the point stands thus : According to Sir HUGH CAIRNS'S Act, the Court has jurisdiction to give damages in any case where a bill is properly filed in this Court. I do not think, however, that Mr. Rolt's Act makes it compulsory upon the Court so to do ; the case, therefore, stands in this position, that we have power to give damages, but are not compelled to do so.

Looking, then, to the nature of the present case, it is not a case in which we should, in my judgment, be well advised to go into the question of damages.

The bill must be dismissed, as was the bill in *Johnson v. Wyatt*, though not exactly on the same grounds, for there we were of opinion that the appellants were not entitled to damages at all. We do not say that here. But the case could be more effectually disposed of in a Court of Law than in a Court of Equity, which has been placed by Mr. Rolt's Act in the sometimes difficult position of being compelled to decide questions of fact either on insufficient statements contained in affidavits or else by examination of all the witnesses before itself.

* 217 The dismissal of the bill should, in order that no * argument may be raised upon the facts, as though the question of damages was thereby concluded, be expressed to be without prejudice to the right of the appellant to bring such action as he may be advised.¹ It should also be without costs ; and if any costs have been paid under the decree they should be returned. There will be no costs of the appeal.

THE LORD JUSTICE KNIGHT BRUCE. — I agree.

(a) 2 De G., J. & S. 18.

¹ See *Robson v. Whittingham*, L. R. 1 Ch. Ap. 442.

BROUN v. KENNEDY.

1864. January 26, 27, 29. Before the LORDS JUSTICES.

Where a client, two months after protracted and complicated litigation with reference to the ownership of an estate of considerable value had been brought to a successful issue under the guidance of a barrister, executed in favour of the latter a grant of the reversion in the estate expectant on the client's own death, charged with the client's debts and legacies to a specified amount: *Held*, that the deed must be set aside, whether as a deed of a gift, or as a contract, the evidence showing undue influence over, and want of independent advice on the part of the client.¹

Quære, whether the deed would not be bad on the grounds of champerty and maintenance. *Per* the Lord Justice KNIGHT BRUCE.

THIS was an appeal by the defendant Charles Rann Kennedy from a decree of the Master of the Rolls, whereby his Honor ordered the deed of the 10th of May, 1859, herein after stated, to be delivered up to be cancelled, with consequential directions, and further ordered the appellant to pay the costs of the suit.

The case in the Court below is reported in the 33d volume of Mr. Beavan's Reports, (a) and from that report the facts of the case very fully appear.

For the purposes of this present report they sufficiently
* appear from the judgment of the Lords Justices. The * 218
bill sought, in addition to an injunction, as ancillary to the relief prayed in respect of the impugned deed, an injunction to restrain the appellant from publishing or disclosing any facts or circumstances which had come to his knowledge as the counsel or confidential adviser of the female respondent, and also from printing or publishing any of her letters to him.

The appeal was argued for the respondents by *Mr. Cole* and *Mr. Kay*. The appellant argued his own case.

(a) Page 133.

¹ See *Gresley v. Mousley*, 4 De G. & J. 78, 99; *Savery v. King*, 5 H. L. Cas. 627; 2 Sugden V. & P. (8th Am. ed.) 689, 690, and notes; *Carter v. Palmer*, 8 Cl. & Fin. 657; *Austin v. Chambers*, 6 Cl. & Fin. 1; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *Arnold v. Brown*, 24 Pick. 96; *Lyddon v. Moss*, 4 De G. & J. 104; *Kerr F. & M.* (1st Am. ed.) 164, 165; *Arden v. Patterson*, 5 John. Ch. 49, 50.

Huguenin v. Baseley, (a) *Wood v. Downes*, (b) and *Holman v. Loynes* (c) were referred to.

January 29.

THE LORD JUSTICE KNIGHT BRUCE. — In this case the defendant, a barrister, acted during some part of the year 1856, and during the years 1857 and 1858, and at least during the first four or five months of the year 1859; professionally on behalf of a widow named Mrs. Swinfen, and as her confidential adviser. The relation between them was mainly, if not altogether, concerned with a claim, a strongly opposed claim, of some importance, which, as the devisee or alleged devisee of her father-in-law, Mr. Swinfen, a gentleman formerly of Staffordshire, she made to his real estate, a property it seems of considerable value. The defendant appears to have been an able and effectual adviser and advocate to the lady in this contest, which, after enduring some years in various
 * 219 shapes and with various success, was * brought to a termination in her favour very shortly before the month of May, 1859. (d)

In the early part of that month the lady and Mr. Kennedy executed at Birmingham a deed dated the 10th of May, 1859, the contents of which were these : —

“ This indenture, made the 10th day of May, 1859, between Patience Swinfen, of Swinfen Hall, in the county of Stafford,

(a) 14 Ves. 273. (b) 18 Ves. 120. (c) 4 De G., M. & G. 270.

(d) On the 5th of March, 1859. See *Swinfen v. Swinfen*, 27 Beav. 148, 167.

The course of the earlier litigation referred to by the Lord Justice may be seen in and from the cases of *Swinfen v. Swinfen*, 18 C. B. 485, 1 C. B. N. S. 364; *Swinfen v. Swinfen*, 24 Beav. 549, 2 De G. & J. 381; and *Swinfen v. Swinfen*, 27 Beav. 143.. Reference was also made in the present suit to two actions at law brought by Mrs. Swinfen, the widow, against two tenants of part of the Swinfen estates and considerable litigation in such actions.

The history of the case, subsequently to the month of May, 1859, may be seen from the cases of *Swinfen v. Swinfen*, 29 Beav. 199, 207, 211; and *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; the latter being an action brought, as was alleged by the bill in the present suit, by the appellant's inducement in opposition to the strongly expressed wishes of Mrs. Swinfen.

The earlier course of the litigation between the present appellant and Mrs. Swinfen, the widow, who, by her next friend and together with her second husband, Charles Wilsone Broun, were plaintiffs in the present suit, may be gathered from the case of *Kennedy v. Broun*, 13 C. B. N. S. 677.

widow, of the one part, and Charles Rann Kennedy, of the Inner Temple, London, barrister, of the other part. Whereas, the said Patience Swinfen has for a long time past been engaged in legal proceedings in and about the defending and establishing her title to the estate herein after mentioned, and the said legal proceedings have been brought to a final conclusion, and her title to the said estates is now fully established; and whereas, the said Charles Rann Kennedy has been engaged as her counsel in the said legal proceedings, and she, the said Patience Swinfen, desires to recompense * him for his services as such counsel, * 220 and to convey to him the reversion of the said estate subject to her own life-interest therein and chargeable as herein after appears: now this indenture witnesseth, that in consideration of the services rendered to her as aforesaid by the said Charles Rann Kennedy, and also in consideration of her esteem and friendship for the said Charles Rann Kennedy, she, the said Patience Swinfen, doth hereby of her own free will give, grant, and convey unto the said Charles Rann Kennedy and his heirs all that her estate at Swinfen, near Lichfield, in the said county of Stafford, comprising a mansion-house and grounds, and several farms near or adjoining thereto, all which said estate was devised to her the said Patience Swinfen by Samuel Swinfen, of Swinfen Hall aforesaid, and all the lands, hereditaments, rights, liberties, easements, privileges, rents, and profits whatsoever to the said estate belonging or in anywise appertaining, or with the same now or at any time heretofore demised, held, occupied, or enjoyed, or reputed, deemed, taken, or known as part or parcel thereof, with their appurtenances; and all the estate, right, title, interest, property, claim, and demand both at law and in equity of her the said Patience Swinfen in, to, or upon the said premises and every part thereof; to have and to hold the said estate, mansion-house, grounds, farms, lands, hereditaments, and all and singular other the premises hereby given, granted, and conveyed or expressed and intended so to be, unto the said Charles Rann Kennedy and his heirs, to the use of the said Patience Swinfen for the term of her natural life; and from and after the decease of the said Patience Swinfen to the use of the said Charles Rann Kennedy, his heirs and assigns, subject to and chargeable with all such debts as shall be due and owing from the said Patience Swinfen at the time of her decease, not exceeding in the * whole * 221

the sum of 10,000*l.*, and also subject to be chargeable with the payment of such sum or sums of money not exceeding in the whole the sum of 10,000*l.*, to such person or persons respectively as the said Patience Swinfen shall by her last will direct and appoint.

“ In witness whereof the said parties hereunto have set their hands and seals the day and year first above written.

| | |
|--|--|
| “ Signed, sealed, and delivered by the above named Swinfen Patience and Charles Rann Kennedy, in the presence of | } PATIENCE SWINFEN. (L.S.) CHARLES RANN KENNEDY. (L.S.) |
| “ EDWARD H. COLLIS, Att ^y , Birmingham. “ JAMES URE, Att ^y , Birmingham.” | |

This deed, I need scarcely say, had reference to the various and extensive litigation to which at the outset of my observations I alluded,— a litigation in which and with reference to which she had by the advice and professional ability and exertions of the defendant been so much assisted.

The only question now before us, besides the costs of the suit, is the question whether this Court ought to allow the deed to stand or ought to set it aside with the consequential directions.

The contents of the deed are possibly alone sufficient to condemn it, at least on the assumption that the statements, the recitals, contained in it, are true. But of their truth in fact being believed, the defendant, who himself drew the instrument, cannot certainly complain.

It is, however, not perhaps impossible to suppose the existence of circumstances in point of fact sufficient to support the
 * 222 deed in the defendant's favour. Are there, * however, any such circumstances in evidence before the Court? In my opinion not.

The deed was either a mere gift or was executed in pursuance of a contract.

As a gift, of course it could not be sustained between a client, whether man or woman, and the counsel of that client who had been so recently engaged for the client professionally in legal matters, such as those which have been mentioned, namely, in re-

covering for the client the real estate itself, of which so valuable a portion formed the very subject of the gift.

Whether, however, the deed was executed in pursuance of a contract or otherwise, the draft of it was drawn by the defendant himself, nor was any other professional person concerned or consulted on the subject or with reference to it on behalf of the lady before she executed it, except that Messrs. Collis & Ure, solicitors, of Birmingham, in whose office or under whose direction the deed was engrossed on the 9th or 10th of May, 1859, at Birmingham, saw her and spoke to her upon the subject upon the 10th before her execution of it on that day there, which execution they attested. And I am of opinion that, apart from all considerations of public policy, she had and has a right to complain seriously and effectually that she laboured under a want of sufficient advice, information, and assistance, on the subject before, and when she executed the deed, which in my judgment was and is an instrument of great and substantial and manifest impropriety, — one from which the lady who executed it has, however clever she may be and probably is, a plain right to be delivered, and against which relief could not be refused to her without discredit to the administration of justice.

* There being nothing else in question (for the defend- * 223
ant has conceded that the injunction granted must stand),
of course the appeal of Mr. Kennedy must be dismissed with
costs; for though there are some inaccuracies in the bill, they are
such and in such a case as to be of no moment.

THE LORD JUSTICE TURNER. — I think it unnecessary to say
more than a few words upon this case.

The decree appealed from is in such entire conformity with the
principles and decisions of the Court that its validity cannot, in
my opinion, be doubted. Although I thought it due to the defend-
ant to suspend the judgment for the purpose of more carefully
considering the case, I have not at any time felt any doubt upon
it. To reverse this decree would be to unsettle the law upon a
point on which the best interests of society require that it should
be absolutely adhered to.

The defendant, in the course of his argument, invited us to
give an opinion on his conduct. I advisedly decline to do so fur-

ther than by saying that it has been wholly at variance with the principles of the Court.

The defendant has also complained of some of the allegations of the bill as irrelevant and unfounded; but upon examining the case I do not think any of the allegations so irrelevant, nor, having regard to the position in which the defendant stood towards the female plaintiff, and the weight which would almost necessarily be given by her to his statements and opinions, do I think any of them so clearly shown to be unfounded as to relieve the defendant from the liability to costs which public policy requires

* 224 should be attached to transactions of this description. * Any possible doubt as to any part of the costs is, I think, removed by reference to the 90th and 98th paragraphs of the answer, in both of which the defendant has plainly insisted on the complete validity of the deed.

The appeal must be dismissed with costs.

RAVENS CROFT v. JONES.

1864. January 30. Before the LORDS JUSTICES.

A testator by his will gave his daughter a legacy of 700*l*. Two subsequent codicils contained no reference to the legacy. The daughter then became engaged to be married, and the testator thereupon gave her 100*l*., which she used for her outfit. After the marriage the testator gave the husband of the daughter 400*l*. On neither occasion was any reference made to the will or the testator's intended testamentary dispositions. Afterwards the testator executed a further codicil to his will, which contained no reference to the 700*l*. legacy, and expressly confirmed the will. *Held*, —

1. That the 100*l*. was a gift and not an advancement, nor a substitution total or partial for the 700*l*. legacy.
2. That the same was the case as to the 400*l*. *Per* the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls; but on other grounds the Lord Justice TURNER doubting.¹
3. That the existence of the last codicil to the will, though not decisive of the question, was a fact which could not be left out of consideration. *Per* the Lord Justice KNIGHT BRUCE.

THIS was an appeal by the defendants, the executors of the will of Joseph Jones, the testator in the cause, from the order made

¹ See *Montefiore v. Guedalla*, 1 De G., F. & J. 93, note (1) and cases cited.

by the Master of the Rolls on further consideration, whereby his Honor held that two sums of 100*l.* and 400*l.*, which were respectively paid by the testator in his lifetime under the circumstances herein after appearing, did not constitute an ademption *pro tanto* of a legacy of 700*l.* given to his daughter, the respondent Martha Ravenscroft, by his previously executed will; and that consequently she was entitled to the whole of the 700*l.* legacy, and not to 200*l.* part thereof only as the chief clerk had found.

The case in the Court below is reported in the 32d volume of Mr. Beavan's Reports. (a) The following * state- * 225 ment of the facts is sufficient for the purposes of this report : —

The testator's will under which the respondent Martha Ravenscroft claimed the 700*l.* legacy was made in 1849.

By it the testator, after reciting various advances made by him to his children, gave them legacies varying in amount, the legacy of 700*l.* to his daughter Martha being among the number, and divided his residuary estate between his sons and the issue of a deceased child.

At the date of this will, Martha Ravenscroft was a spinster living alone with her parents, of whom both were old and the testator was infirm. Two codicils to the testator's will dated respectively in January, 1851, and June, 1852, contained no reference to the legacy by the will given to his daughter Martha. The latter became engaged to be married to the respondent Alfred Ravenscroft in March, 1855, and about three weeks after the announcement to her father of the engagement, her mother gave her 100*l.* in country bank notes, saying it was from her father.

As to this sum, the respondent Martha Ravenscroft deposed that she had had nothing else given to her to provide for her wedding and marriage, that out of that sum she had bought her own wedding dress, and paid for other articles of dress and linen and other necessaries which she had required on her marriage, and she also had paid the expenses of a journey to London. It did not appear that any thing was said at the time of this gift by the testator or his wife as to his will or his intended testamentary dispositions.

* The marriage was solemnized in June, 1855, and about * 226 three weeks afterwards the newly married couple were

(a) Page 669.

visiting at the house of the lady's parents, when a transaction occurred which was thus deposed to by the husband of the lady :

“ About three weeks after our marriage I was at the house of my wife's father in a room adjoining to that in which he was, and his wife placed in my hands country bank notes to the amount of 400*l.*, and said :— ‘ Mr. Jones told me to give you this.’ I went into the other room and thanked my father-in-law, who said, ‘ he hoped it would do me good.’ He said nothing then or at any other time of his will or his intentions as to his property, nor did I know any thing about them.”

The testator in June, 1856, made a further codicil to his will. This codicil, like the earlier ones, was silent as to the 700*l.* legacy, but expressly confirmed the will.

The testator died in February, 1859, leaving children and issue.

The suit was instituted by Mr. and Mrs. Ravenscroft for the administration of the testator's estate ; and at the hearing, accounts and inquiries were directed, in answer to one of which the chief clerk had certified to the effect herein before stated ; and the Master of the Rolls having reversed the chief clerk's finding in this respect, the present appeal was brought as is already stated by the executors.

Mrs. Jones, the testator's widow, deposed that she had no doubt whatever, from conversations she had had with the testator, that he intended the sums of 100*l.* and 400*l.* respectively as part of the 700*l.* legacy given by his will to his daughter Martha.

* 227 * *Mr. Hobhouse* and *Mr. H. Fox Bristowe* appeared for the appellants ; and

Mr. Southgate and *Mr. J. H. Taylor*, for the respondents.

The scope of the arguments will be seen from the judgment of the Lord Justice KNIGHT BRUCE, and the authorities referred to were the following :—

Ex parte Pye, (a) *Pym v. Lockyer*, (b) *Montefiore v. Guedalla*, (c) *Powys v. Mansfield*, (d) *Ferris v. Goodburn*, (e) *Mon-*

(a) 18 Ves. 140.

(d) 3 Myl. & Cr. 359.

(b) 5 Myl. & Cr. 29.

(e) 27 L. J. (N. S.) Ch. 574.

(c) 1 De G., F. & J. 93.

tague v. Montague, (a) Kirk v. Eddowes, (b) Debeze v. Mann, (c) Robinson v. Whitley, (d) M'Clure v. Evans, (e) Suisse v. Lord Lowther. (g)

THE LORD JUSTICE KNIGHT BRUCE. — Assuming, as to both the sums here in dispute, the burden of proof to rest upon the respondents, the respondents have in my judgment discharged themselves of that burden.

With respect to the smaller sum, the 100*l.*, it would seem to have been paid over to the testator's daughter simply as some provision for her outfit, and to enable her to marry with a little ready money in her pocket; and on the assumption to which I have referred, I apprehend that no jury could be reasonably directed or asked to answer the question whether that gift was intended as * a satisfaction of the 700*l.* legacy pre- * 228 viously given by the will in any other than one way.

With respect to the second and larger gift, that of 400*l.*, I prefer to express no opinion as to the ground upon which, to a great extent at least, the Master of the Rolls appears to have proceeded; namely, that the daughter herself was the legatee, while the payment was made to the husband of the daughter. I do not rely upon that ground, nor, on the other hand, do I express any dissent from it. But the whole of the circumstances in evidence, the time, circumstances, and manner of the gift, show in my judgment that it was intended as a simple gift, and not as a substitution total or partial for the legacy of 700*l.* which the testator had previously given to his daughter by his will. That will or that legacy the testator had not, I think, in his mind at the time.

I should have been of that view independently of the last codicil to the will; and I feel that I am not departing from the case of *Powys v. Mansfield, (h)* nor from any other of the authorities, in saying that the existence of such a codicil, even though not decisive of the question, is a fact which cannot be left out of consideration.

In my judgment, the conclusion of his Honor the Master of the

(a) 15 Beav. 565.

(b) 3 Hare, 509.

(c) 2 Bro. C. C. 165, 519.

(d) 9 Ves. 577.

(e) 29 Beav. 422.

(g) 2 Hare, 424.

(h) 3 My. & Cr. 359.

Rolls in favour of the title of the respondents to the whole of the legacy of 700*l.* with interest, undiminished by either the 100*l.* or the 400*l.*, is correct, and the appeal one substantially without foundation.

* 229 * THE LORD JUSTICE TURNER. — I agree with my learned brother and his Honor the Master of the Rolls upon the question raised as to the 100*l.* That sum in my judgment was clearly a gift and not an advancement, and ought not to be taken into account as part of the 700*l.* legacy previously given by his will by the testator to his daughter.

I am not, however, satisfied that the same conclusion can be properly come to with respect to the 400*l.*, which, as it appears to me, stands upon a different footing.

My doubt on this point, however, will not affect the result of the appeal, which is decided by the agreement in judgment of my learned brother with his Honor the Master of the Rolls, and the decision of his Honor will consequently be affirmed.

COCHRANE *v.* WILLIS.

1864. January 30. Before the LORDS JUSTICES.

The principle laid down in *Brownsword v. Edwards*, 2 Ves. Sen, 243, 247, that the Court will not determine on demurrer doubtful questions on a legal title, even though its opinion incline in favour of the defendant, but will overrule the demurrer without prejudice to the defendant's insisting upon the same matters by way of answer, is equally applicable to cases where the doubtful question arises on an equitable title.¹

THIS was an appeal by the plaintiff from the allowance by the Master of the Rolls of a general demurrer to the bill for want of equity.

As will be seen, the Lords Justices reversed the decision of the Master of the Rolls, and the cause accordingly proceeded and came on for hearing in the usual way. It is reported,
* 230 on the hearing before his Honor, *in the 34th volume of

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 315, 542, 543, 602.

Mr. Beavan's Reports, (a) and before the Lords Justices on appeal from his Honor's decision in the Law Reports. (b) In each of these reports the facts of the case are fully stated.

For the purpose of the present report it is, however, sufficient to state that the question before the Court on the present appeal turned upon two points: one, whether a certain agreement of the 30th of October, 1863, the enforcement of the specific performance of which was in effect the object of the suit, had any consideration to support it, and was, therefore, not wholly void; the other, whether, even in that event, the Court would specifically enforce it.

Mr. Baggallay and *Mr. G. L. Russell* appeared for the appellant, and on one point of the case referred to *Head v. Godlee* (c) and *Horne v. Barton*. (d)

Mr. Selwyn and *Mr. Hobhouse* and *Mr. G. W. Lawrence*, for the defendants, argued that it was the interest of all parties that the question at issue should be decided shortly on demurrer.

Mr. G. L. Russell, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Assuming the truth of the well-pleaded facts stated in the bill, as on demurrer we are bound to do, I think that an equitable question of some difficulty is raised in this case, — a question which will require consideration, and one upon which at present I have formed no concluded opinion. Possibly, for that very reason alone, however, * I * 231 am clear that the case is not one to be tried on demurrer.

LORD HARDWICKE, in *Brownword v. Edwards*, (e) thus laid down the rule: —

“As this is a question upon the legal title to an estate on the construction of a will, if there was any doubt I should not determine it on demurrer; but would, notwithstanding the inclination of my opinion might be in favour of defendant, overrule the demurrer without prejudice to the defendant's insisting on the

(a) Page 359.

(b) L. R. 1 Ch. 58.

(c) Johns. 536.

(d) 8 De G., M. & G. 587, 601.

(e) 2 Ves. Sen. 243, 247.

same matters by way of answer; so that it might more fully come before the Court on the hearing.”

In my judgment, that principle applies equally to a case like the present — a case where there is a doubtful question upon an equitable title — as to a case where the doubtful question arises on a legal title.

Without, therefore, giving any opinion on the merits, be they what they may, of this case, either in favour or against either side, this demurrer should in my judgment be overruled without prejudice to any such defence as the defendants or either of them may be advised to raise by answer, and the costs both herein and the Court below made costs in the cause.

THE LORD JUSTICE TURNER. — I agree in thinking that the course suggested by my learned brother is the proper course to be taken in this case. It is a course which will allow the question to be tried at the hearing of the cause upon the whole facts, which may, in one view of the case, entirely dispose of it, — I mean on the assumption that the Court at the hearing is of opinion
 * 232 that the agreement in question in the suit is * not without a consideration to support it, and therefore not wholly void; for in that event, the succeeding question, whether or not even so the Court would enforce the agreement specifically, must depend for its decision upon all the circumstances of the case, which will at the hearing only be open before the Court.

[180]

In the Matter of The WESTMINSTER ESTATE of the PARISH of ST. SEPULCHRE, London ;

AND

In the Matter of The WESTMINSTER BRIDGE ACTS, 1853 and 1859, and the Statute 9 & 10 Vict. c. 39.

Ex parte the VICAR, CHURCHWARDENS, and TRUSTEES of the PARISH of ST. SEPULCHRE.

1863. May 29. 1864. February 17. Before the Lord Chancellor Lord WESTBURY.

A public improvements Act referred back to and incorporated an earlier public improvements Act, which in its turn referred back to and incorporated a third. Each of the three Acts was passed after the Lands Clauses Act, and in none of them was there any provision for the payment of costs by the promoters, except in the case of moneys paid into Court in the cases of persons under disability : *Held*, that the provisions contained in the 80th section of the Lands Clauses Act as to the payment by the promoters of the costs of sales and conveyances must be considered as incorporated in the later Act, there being nothing in them to vary or except such provisions.

Observations on *In re Cherry's Settled Estates*, 4 De G., F. & J. 332.

In re Strachan's Estate, 9 Hare, 185, approved on the point of construction.

THIS was an appeal by the Commissioners of Works and Public Buildings from a decision of the Vice-Chancellor KINDERSLEY, which directed them to pay the costs of the respondents, the vicar, churchwardens, and trustees of the parish of St. Sepulchre, from whom the appellants had taken certain lands under their statutory powers, in respect not merely of the reinvestment of the purchase-money, to which the appellants did not object, but also of the sale to the appellants.

*The Lands Clauses Consolidation Act, 1845, Stat. 8 & 9 * 233 Vict. c. 18, enacts in effect, and amongst other things not material for the purposes of the present report, by sect. 1, that the Act shall apply to all undertakings authorized by Acts to be thereafter passed ; by sect. 80, that the Court of Chancery may order the promoters of the undertaking to pay the costs of persons from whom lands are taken where the purchase-moneys are deposited in Court ; and by sect. 82, that the promoters of the

undertaking shall pay the costs of conveyances of lands to be purchased under the provisions of that or the special Act or any Act incorporated therewith. The exact terms of each of these sections are set out below. (a)

(a) The Lands Clauses Consolidation Act, 1845, sect. 1. . . . "That this Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed, together therewith, as forming one Act."

Sect. 80. "In all cases of moneys deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking (that is to say): the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such moneys in government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the cost of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such moneys shall be invested, and for the payment out of Court of the principal of such moneys, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: provided always, that the costs of one application only for reinvestment in land shall be allowed, unless it shall appear to the Court of Chancery in England or the Court of Exchequer in Ireland that it is for the benefit of the parties interested in the said moneys that the same should be invested in the purchase of lands, in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking."

Sect. 82. "The costs of all such conveyances shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interest therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."

* By the Chelsea Bridge and Embankment Act, Stat. 9 & * 234
10 Vict. c. 39, the Commissioners of Woods and Forests
were constituted a corporation for carrying into effect the purposes
of the Act, and were empowered to take lands, the prices to be
agreed or assessed as in the Act mentioned. And by the 44th
section of the Act provision was made for the payment into the
Court of Chancery of moneys exceeding 200*l.* belonging to persons
under disability, and for the application of such moneys; and by
the 49th section, for the payment of the expenses of purchases by
the commissioners. The exact terms of these two sections are set
out below. (a)

(a) 9 & 10 Vict. c. 39, § 44. "And be it enacted, that if any money shall
be agreed or assessed to be paid for any houses, buildings, ground, tenements,
or hereditaments, or part or parts thereof, or share or shares, estate or estates,
interest or interests therein, or charge or charges thereon, or for any other right,
matter, or interest, of what nature or kind soever, purchased, taken, or used by
virtue of this Act, which shall belong to any body politic, corporate, or collegiate,
feme covert, infant, lunatic, or other person or persons under any disability or
incapacity, or not legally entitled absolutely to dispose of the premises by the
sale of which such money shall be produced, such money shall, in case the same
shall amount to or exceed the sum of two hundred pounds, with all convenient
speed be paid into the Bank of England in the name and with the privity of the
accountant-general of the Court of Chancery, to be placed to his credit there
ex parte the commissioners of her Majesty's woods, forests, land revenues,
works, and buildings, pursuant to the method prescribed by an Act passed in
the twelfth year of the reign of his late Majesty King George the First, intituled
an Act for the better securing the moneys and effects of the suitors of the Court
of Chancery, and to prevent the counterfeiting of East India bonds and endorse-
ments thereon, and likewise endorsements on South Sea bonds, and pursuant to
the general rules and orders of the said Court, and without fee or reward,
according to the Act of the twelfth year of the reign of King George the Second,
intituled an Act to empower the High Court of Chancery to lay out on proper
securities any moneys not exceeding a sum therein limited, out of the common
and general cash in the Bank of England, belonging to the suitors of the said
Court, for the ease of the said suitors, by applying the interest arising therefrom
for answering the charges of the office of accountant-general of the said Court,
to the intent that such money shall be applied, under the direction and with the
approbation of the said Court, to be signified by an order made upon petition
to be preferred in a summary way by the body or bodies, person or persons,
who would have been entitled to the rents and profits of the said houses, build-
ings, ground, tenements, or hereditaments, in the purchase or redemption of the
land tax, or towards the discharge of any debt or debts, or such other incum-
brances or part thereof as the said Court shall authorize to be paid, affecting the
same houses, buildings, ground, tenements, or hereditaments, or part or parts
thereof, or share or shares, estate or estates, interest or interests therein, or

* 235 * By the Westminster Bridge Act, 1853, Stat. 16 & 17
 Vict. c. 46, the appellants were constituted a corporation
 * 236 * for carrying into effect the purposes of that Act; and by
 the 13th section of the Act, so far as it is material for
 * 237 * the purposes of this report, sects. 23 to 56, both inclusive
 (amongst others), of the Chelsea Bridge and Embank-
 ment Act were to be deemed to be in the Act now in statement
 repeated, with the alterations necessary to make the same appli-

charge or charges thereon, or affecting other houses, buildings, ground, tene-
 ments, or hereditaments standing settled therewith to the same or the like uses,
 trusts, intents, or purposes; and where such money shall not be so applied,
 then the same shall be laid out and invested, under the like direction and appro-
 bation of the said Court in the purchase of other messuages, lands, tenements,
 or hereditaments, which shall be conveyed and settled to, for, and upon such
 and the like uses, trusts, intents, and purposes, and in the same manner as the
 hereditaments which shall be so purchased, taken, or used as aforesaid stood
 settled or limited, or such of them as at the time of making such conveyance
 or settlement shall be existing undetermined and capable of taking effect;
 and in the mean time, and until such purchase shall be made, the said money
 shall, by order of the said Court, upon application thereto, be invested by the
 said accountant-general in his name in the purchase of three pounds per centum
 consolidated or three pounds per centum reduced bank annuities; and in the
 mean time, and until the bank annuities shall be ordered by the said Court to be
 sold for the purposes aforesaid, the dividends of the said consolidated or reduced
 bank annuities shall from time to time be paid, by order of the said Court, to
 the body or bodies, person or persons, who would for the time being have been
 entitled to the rents and profits of the houses, buildings, ground, tenements,
 and hereditaments so hereby directed to be purchased in case such purchase
 or settlement were made."

Sect. 49. "Provided also, and be it enacted, that where by reason of any
 disability or incapacity of the body or bodies, trustee or trustees, corporation,
 or other person or persons entitled to any houses, buildings, ground, tenements,
 or hereditaments, or part or parts thereof, or share or shares, estate or estates,
 interest or interests therein, or charge or charges thereon, to be purchased or
 taken under the authority of this Act, the purchase-money for the same shall be
 required to be paid into the Bank of England in the name and with the privity
 of the accountant-general of the Court of Chancery, and to be applied in the
 purchase of other lands, tenements, or hereditaments, to be settled to the like
 uses, in pursuance of this Act, it shall be lawful for the said Court to order the
 expenses of all purchases from time to time to be made in pursuance of this Act,
 or so much of such expenses as the said Court shall deem reasonable, to be paid
 by the said commissioners, who shall from time to time pay such sum or sums
 of money out of the moneys applicable to the purposes of this Act as the said
 Court shall direct."

cable to the new bridge and approaches authorized by the Act and to the appellants.

By the Westminster Bridge Act, 1859, Stat. 22 & 23 Vict. c. 58, the appellants were constituted a corporation for the purposes of that Act; and by its third section the powers and provisions of the Westminster Bridge Act, 1853, were extended to the Act of 1859 in terms which are set out below. (a)

The respondents were the trustees of the charity estate of the parish of St. Sepulchre, in the city of London, called "Newcastle gift," referred to in the schedule to the Westminster Bridge Act, 1859, as * the owners of No. 7 New Palace Yard, * 238 a property which the Act empowered the appellants to take for the purposes thereof; and the appellants desiring to take such property, and having agreed the price thereof with the respondents at 8800*l.*, paid the money into Court under the 44th section of the Chelsea Bridge and Embankment Act, as incorporated by means of the 13th section of the Westminster Bridge Act, 1853, in the Westminster Bridge Act, 1859.

The respondents subsequently entered into a conditional contract with the corporation of London for the purchase of certain freehold hereditaments in Thames Street for 3000*l.* To this contract they obtained the sanction of the Court of Chancery on a petition presented by them for the purpose, with an order upon the appellants to pay them their costs "according to the Act." A difficulty arose before the registrar in drawing up this order in

(a) Westminster Bridge Act, 1859, § 3. "All the powers by the said Westminster Bridge Act, 1853, either expressly or by reference to the Acts therein cited or either of them, given to the said commissioners of her Majesty's Works and Public Buildings, with regard to the hereditaments specified in the second schedule to the said Westminster Bridge Act, 1853, shall be given to and are hereby vested in the said commissioners of her Majesty's Works and Public Buildings with regard to the hereditaments specified in the schedule hereto, and all the provisions, directions, and enactments in the said Westminster Bridge Act, 1853, either expressly or by reference to the other Acts therein cited, or either of them, contained (except as herein otherwise specially provided for) shall be construed in all respects as if the hereditaments specified in the schedule hereto had been specified in the second schedule to the said Westminster Bridge Act, 1853: provided always, that nothing herein contained or referred to shall authorize the said commissioners of her Majesty's Works and Public Buildings to exercise any compulsory powers for taking any of the hereditaments specified in the schedule hereto beyond the period of five years from the passing of this Act, but during such period such powers shall continue in force."

respect of this latter part of it, the appellants desiring that the order should in terms define what costs they were to pay. The respondents by their petition claimed to have their costs of the sale of No. 7 New Palace Yard to the appellants, and also the costs of the purchase of the Thames Street freeholds paid by the appellants; whilst the appellants repudiated any liability to pay more than the costs of the reinvestment of the purchase-money. The matter was brought before the Vice-Chancellor on motion with reference to the minutes of the order and argued; and his Honor thereupon made the order under appeal.

The Solicitor-General (Sir ROUNDELL PALMER) and *Mr. Hanson*, for the appellants, contended that the order under appeal was wrong in directing payment by the appellants of the costs of the sale to them. They commented on the 44th and 49th sections of the Chelsea Bridge and Embankment Act as incorporated with the Westminster Bridge Acts, and referred to *In re Strachan's Estate* (a) and *In re Cherry's Settled Estates*. (b)

Mr. Pontifex, for the respondents, supported the order under appeal, and contended that it was warranted by the Lands Clauses Act, 1845, §§ 1, 82, which must be taken as incorporated with, although not mentioned in, the subsequently enacted Chelsea Bridge and Embankment Act, or either of the Westminster Bridge Acts. The Act referred to *In re Strachan's Estate* (a) was passed antecedently to the passing of the Lands Clauses Act. Even apart from that consideration, however, and upon the special Acts here in question, the order was right. *Ex parte Eton College*. (c)

The Solicitor-General, in reply.

Judgment reserved.

1864. February 17.

The Lord Chancellor, after referring shortly to the facts of the case, and remarking that both sides had been willing to take

(a) 9 Hare, 185.

(c) 20 L. J. (N. S.) Ch. 1.

(b) 4 De G., F. & J. 332.

the rule as given in the sections of the Chelsea Bridge and Embankment Act, although it might be open to argument whether the real effect of the several statutory enactments was so to incorporate that rule in the Westminster Bridge Acts as to make it an intelligible rule, referred to the 44th and 49th * sec- * 240 tions of the Chelsea Bridge and Embankment Act, and proceeded as follows : —

The 44th section of this Act is material in this way only, — that it absolutely directs that all the purchase-money of lands belonging to persons who are under disability to contract to sell either by reason of infancy, coverture, or fiduciary position, when paid into Court shall be applied in the repurchase of other lands to the same uses, and in the mean time may be applied in temporary investments in the funds ; and shows that persons under disability are not given by these Acts of Parliament the ordinary powers which trustees have of deducting their reasonable expenses out of the capital of the trust funds which they are entitled to receive.

The 49th section provided in effect that where by reason of disability the money has been paid into Court to be applied “in the purchase of other lands, tenements, or hereditaments, to be settled to the like uses ;” that (in a shorter form of expression) is, wherever purchase-money has been paid into Court under the 44th section, it shall be lawful for the Court to order “the expenses of all purchases from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable to be paid by the said commissioners.”

The Vice-Chancellor, construing the words “purchases from time to time to be made in pursuance of this Act” apart from the context, has held them to refer to all purchases of every description, including, therefore, purchases made by the appellants, as well as purchases made by persons out of the money they have received from sales to the appellants ; and it is stated that his Honor not only so decided but expressed his * opinion * 241 that such decision was fortified by the abstract justice of the case.

I think, however, that the words of the Act to which I have referred must be taken in conjunction with their context, and that considerations of abstract justice cannot be brought in in a matter of positive law to supply a *casus omissus* by a departure from the

established rules of interpretation. In addition, his Honor's construction is at variance with the decision of Vice-Chancellor TURNER upon identically the same words in another Act in *In re Strachan's Estate* (a), a case cited before him, but upon the earlier part of which his attention appears not to have been fixed.

I think, however, that the order under appeal is, in fact, correct.

Every one must feel that it is extremely important that there should be means of reimbursing to persons under disability the costs properly incurred in transactions of this nature. If the trustee, the guardian, the corporation, could not receive the costs incurred in prudent management attending these sales, they would be delivered over bound hand and foot into the power of the promoters of undertakings of this description. On many occasions it is necessary to resort to a jury, and great expense may attend the getting up the case before the jury, so as to insure the charity or trust or the infant or the *feme covert* receiving the proper price of the land; and if these costs cannot be either deducted out of the money received or obtained from the promoters of the under-

takings, the person whose duty it is to protect the interests
* 242 of those under disability would be compelled * of necessity to abstain from the proper performance of that duty.

It was from considerations of this kind, I think, that the legislature passed the Lands Clauses Consolidation Act, and I accede to the argument of *Mr. Pontifex* in the present case, that the rule given by the Lands Clauses Act on the subject of costs must be considered as incorporated as to a part of that rule into the subsequently enacted Chelsea Bridge and Embankment Act and Westminster Bridge Acts.

[His Lordship referred to the Lands Clauses Act, § 1, and proceeded thus : —]

The general provisions of the Lands Clauses Act on the subject of costs are, therefore, to be taken as an integral part of this Chelsea Bridge and Embankment Act, unless they are "expressly varied or excepted by such Act." If the particular Act itself gives a complete rule on the subject, the expression of that rule would amount to an exception of the subject-matter of the rule out of the Lands Clauses Act. If, however, the rule given by the particular

(a) 9 Hare, 185.

Act applies only to a portion of the subject, does that interfere with the rule of the Lands Clauses Act remaining incorporated as to the other and separate part of the same subject?

The costs in matters of this kind are divisible into two separate parts. There are the costs incurred by the persons whose lands are taken anterior to the money coming into Court; and there are the costs of the reinvestment of that money. The Lands Clauses Act lays down a distinct rule with regard to both,—the provisions with respect to the costs attending the sale and conveyances being those expressed in the 82d section of the Lands Clauses Act. These provisions are distinct * and separate, and * 243 they require the promoters to pay those costs to the persons whose lands are taken. The Chelsea Bridge and Embankment Act contains a distinct rule with regard to the costs after the payment of the purchase-money into Court, but it leaves entirely untouched the subject of the costs incurred anterior to that time. The rule given by the 82d section of the Lands Clauses Act must, therefore, in my judgment, be recognized as being part of the Chelsea Bridge and Embankment Act, there being nothing in that Act to vary or except it as required by the 1st section of the Lands Clauses Act.

In thus deciding, I am in no way deviating from my own decision in *In re Cherry's Settled Estates*. (a) In that case the Act of Parliament under which the land was taken referred to an antecedent Act of the 3 & 4 Vict., an Act passed before the Lands Clauses Act. The latter Act was, therefore, passed over, and the rule given by an earlier statute adopted. The language of the Act of the 9 & 10 Vict. c. 34, which was in question in *In re Cherry's Settled Estates*, was such as to render transactions under it as though they had been transactions under the antecedent Act of the 3 & 4 Vict., and to pass over the Lands Clauses Act altogether; and it followed that the provisions of that general Act could not affect such transactions.

In the present case, the same reasons as in *In re Cherry's Settled Estates* compelled me to dissent from the Vice-Chancellor's view and to refuse to apply the Lands Clauses Act, compel me to apply the provisions of that statute. The reference back here by the Westminster Bridge Act, 1859, is to the Chelsea Bridge and

(a) 4 De G., F. & J. 332.

* 244 Embankment * Act, Stat. 9 & 10 Vict. c. 39. An integral portion of that Act consists of the clauses on this subject, which are contained in the Lands Clauses Act, and which by the first clause of this latter Act are incorporated with the Act of 9 & 10 Vict. save so far as they are expressly excepted or varied.

Although, therefore, I agree, so far as the 49th section of the Chelsea Bridge and Embankment Act is concerned, with the interpretation put thereupon by the Vice-Chancellor TURNER rather than with that which it has received from the Vice-Chancellor KINDERSLEY; yet, accepting that limited interpretation, I must upon the circumstances of this case direct the costs to be paid to the respondents in conformity with the Vice-Chancellor's order, defining that the costs are given, so far as they are directed to be given, by that section of the Lands Clauses Act, which is to be treated as if it were part of the Act of 1859; and the appellants must pay the costs of the appeal.

1864. February 20, 23. Before the LORDS JUSTICES.

In construing a prenuptial settlement, it must be considered that the intention of the parties to it was to provide for the children of the marriage at the time when those children would require provision to be made for them, and a construction which would exclude a son who attained twenty-one and afterwards died in the lifetime of his surviving parent, cannot be adopted in the absence of words absolutely compulsory.

The language of such a settlement may be controlled by its general intention.

THIS was an appeal by the defendant Catherine Louisa Graves, misnamed in the bill Louisa Catherine Graves, from parts of a decree made by his Honor the Vice-Chancellor STUART.

On one part of the appeal a compromise was arranged at the suggestion of the Lords Justices, and no further notice of it is necessary.

The other part of the appeal raised the question of the construction to be placed upon a settlement dated the 21st of January, 1828, and executed prior to and in consideration of the

marriage of Harry Meggs Graves and Louisa Seton Larkins. On this point the Vice-Chancellor held that the trust funds comprised in the settlement vested in such only of the children of the marriage who being sons attained twenty-one, or being daughters attained that age or married under it, and were under the circumstances of the case divisible in moieties between the appellant and the representative of John Henry Graves.

There were several children of the marriage, all of whom died under twenty-one and unmarried, except John Henry Graves and the appellant, who were two of such children, and both of whom attained twenty-one. John Henry Graves, however, died a bachelor and intestate in the lifetime of his father Harry Meggs Graves, who survived his first wife Louisa Seton Graves, and subsequently * died, having previously married the defendant * 246 Sarah Catherine Graves, his second wife. Walter Farquhar Larkins, the remaining defendant to the original bill, was the legal personal representative of Harry Meggs Graves and also of John Henry Graves.

The bill was filed by the surviving trustees of the settlement, and sought (so far as it is material for the purposes of this report to state it) the ascertainment and declaration of the rights and interests of all parties under the settlement, and the distribution of the trust funds accordingly.

The defendant Sarah Catherine Graves became bankrupt after the bill was filed, and her interest was represented by the defendant George Maddox, her assignee.

The settlement in question was to the following effect:—

It was expressed to be made between Harry Meggs Graves of the first part, Louisa Seton Larkins of the second part, and John Trotter, the respondents Frederick Currie and Alexander Colvin and William Ainslie of the third part.

It commenced with various recitals, showing that a sum of sicca-rupees 32,000 had been provided on the part of Louisa Seton Larkins, and was invested in three promissory notes of the East India Company, and that upon the treaty for the intended marriage it had been agreed that the said three promissory notes should be transferred to John Trotter, Frederick Currie and Alexander Colvin and William Ainslie upon the trusts therein after mentioned; and further recited to the effect * that * 247 Harry Meggs Graves, for making a further provision for

Louisa Seton Larkins and the children of the intended marriage, had executed a certain bond and warrant of attorney for securing another sum of sicca-rupees 32,000.

By the indenture now in statement it was then witnessed and covenanted, declared and agreed, by and between the several parties thereto, that the trustees should stand possessed of the said bond and warrant of attorney upon trust for Harry Meggs Graves until the intended marriage and after the solemnization thereof, to hold the same until Harry Meggs Graves should pay to them the said sum of sicca-rupees 32,000, and upon such payment to deliver up the same bond and warrant of attorney to Harry Meggs Graves to be cancelled; and upon further trust to stand possessed of the sum of sicca-rupees 32,000, or such part thereof as might be paid by Harry Meggs Graves, as the same should from time to time be got in and received, upon trust to invest the same, and to stand possessed of the same fund and securities, upon the same trusts and under and subject to such and the same powers as were therein after declared or expressed, or so many of them as might be then in being or capable of taking effect.

It was further witnessed and expressly agreed and declared by and between the parties thereto that the trustees should stand possessed of the said three several promissory notes therein before described and the interest, dividends, and annual proceeds thereof in trust for Louisa Seton Larkins, until the intended marriage; and after the solemnization thereof to pay and apply the annual proceeds of the three several promissory notes or of the investments thereof to Harry Meggs Graves and his assigns for

* 248 his life, for the joint benefit of himself and Louisa * Seton

Larkins, and after his decease leaving Louisa Seton Larkins him surviving in trust as therein mentioned. And after the death of both Harry Meggs Graves and Louisa Seton Larkins, upon trust to stand possessed of all and every the said trust premises, and the securities respectively wherein the same should or might be invested or laid out, for the benefit of all and every the child or children of the intended marriage, to be divided between and amongst them share and share alike, and to be paid or assigned to such child or children respectively at their respective age or ages of twenty-one years being a son or sons, and at their respective age or ages of twenty-one years, or day or days of

marriage, being a daughter or daughters, whichever should first happen. And in case there should be only one child of the intended marriage, then in trust for such one child only, and to be in like manner paid or assigned at his age of twenty-one years being a son, and at her age of twenty-one years being a daughter, or day of her marriage, which should first happen after the death of the survivor of Harry Meggs Graves and Louisa Seton Larkins.

And it was thereby declared and agreed by and between the parties thereto that the share or shares of such child, if only one, or children, if more than one, should become and be deemed a vested and transmissible interest (being a son or sons) at his or their age or respective ages of twenty-one years, or (being a daughter or daughters) at her or their age or respective ages of twenty-one years, or day or days of marriage respectively, which should first happen after the decease of the survivor of Harry Meggs Graves and Louisa Seton Larkins, to be paid, assigned, or transferred within six months next after the decease of the survivor of Harry Meggs Graves and Louisa Seton Larkins to such of the said children as * should * 249 have attained the age of twenty-one years being a son or sons, or being a daughter or daughters should have attained the said age or be married; but with respect to any child or children being a son or sons or daughter or daughters as should be under the age of twenty-one years or unmarried at such the decease of the survivor of Harry Meggs Graves and Louisa Seton Larkins, then in trust, as to the share or shares of such child or children who should be so under the age of twenty-one years or unmarried as aforesaid, to pay, apply, and dispose of the interest, dividends, and produce thereof, or so much thereof as might be necessary, for and towards the education and maintenance or other benefit of such child or children, according to their respective shares and until the same should respectively become payable in manner aforesaid.

And it was thereby declared and agreed by and between all the parties thereto that in case there should be any child or children who should survive Harry Meggs Graves and Louisa Seton Larkins, and should die before he, she, or they being a son or sons should have attained the age of twenty-one years, or being a daughter or daughters should have attained the said age or been married as aforesaid, then and in that case, and when and as often as

such death or deaths should happen, the share or shares of any child or children so dying, and the dividends, interest, and annual produce which should then have accrued, or afterwards should or might accrue on the same respectively, should be held by the trustees in trust and for the benefit of the survivors and survivor of the said children, and to be equally divided amongst such survivors, if more than one, share and share alike, and to become a vested and transmissible interest, and to be assigned and trans-

ferred to them, her, or him respectively when and as their,
* 250 his, or her original parts or * part, shares or share were and was before vested, and to be paid and transferred as aforesaid. And also that such increased share or shares of the said trust moneys before mentioned as might have accrued to any deceased child or children by the death of any other or others of them should from time to time survive, accrue, and remain over, together with and in the same manner as his, her, or their original portion or portions, share or shares, and become vested and payable at the same time therewith ; and that if all such children except one should die before the said portions or shares of the said principal moneys, and all and every other sum and sums of money should become vested or transmissible as therein before mentioned, or in case there should be only one such child, then upon this further trust that the trustees should stand possessed of the whole of the said principal moneys, and all and every other sum and sums of money as therein before mentioned, and all the interest, dividends, and increase thereof, for the benefit of such one surviving or only child, to become a vested and transmissible interest in such surviving or only child on his or her attaining the age of twenty-one years being a son, or day of marriage being a daughter, which should first happen after the decease of both Harry Meggs Graves and Louisa Seton Larkins.

And it was thereby further covenanted, declared, and agreed between and by all the parties thereto, that in case there should be no child or children of the intended marriage, or in case there should be such child or children, but they should respectively depart this life in the lifetime of Harry Meggs Graves and Louisa Seton Larkins, or in the lifetime of the survivor of them, then the trust premises should be held upon trust to pay, transfer, and assign the whole of the said principal moneys and all and every

other sum and sums of money thereby assigned, or the securities wherein the same might be * then laid out or * 251 invested, and the interest, dividends, and increase thereof, to the survivor of Harry Meggs Graves and Louisa Seton Larkins, her or his executors, administrators, or assigns; and in case there should be such child or children who should survive Harry Meggs Graves and Louisa Seton Larkins, but depart this life before their, his, or her said proportion or share should become vested or payable, then upon the further trust, that the trustees should stand possessed of the said trust moneys and estate and all and every other sum and sums of money thereby assigned, or the securities wherein the same might be invested, for the benefit of such person or persons as the survivor of Harry Meggs Graves and Louisa Seton Larkins should by his or her will direct or appoint; and in case of no such direction or appointment, then in trust for the next of kin of the survivor of Harry Meggs Graves and Louisa Seton Larkins living at the time of the decease of such survivor.

The arguments turned upon a minute criticism of the language of the settlement.

Mr. Greene and *Mr. J. W. Chitty*, for the appellant, contended that the rule laid down by Lord THURLOW in *Woodcock v. The Duke of Dorset*, (a) that in family cases the intention of the parties must govern even at some violence to the language they have used, was a rule which had been disapproved of by subsequent Judges, and one which ought not to be applied except in cases precisely similar, and that it had no application here, as the language of the settlement was unambiguous; and that upon the true construction of the present settlement children, in order to participate in the trust funds, must, if sons, attain twenty-one, or if daughters, attain that age * or marry, and also must survive both parents; * 252 and referred to *Hope v. Lord Clifden*, (b) *Howgrave v. Cartier*, (c) *Perfect v. Lord Curzon*, (d) *Swallow v. Binns*, (e) *Jopp v. Wood*, (g) *Whatford v. Moore*, (h) *Farrer v. Barker*, (i) *Wilson v.*

(a) 3 Bro. C. C. 569.

(b) 6 Ves. 499.

(c) 3 Vea. & Bea. 79; S. C., G. Coop. 66.

(d) 5 Madd. 442.

(h) 3 My. & Cr. 270.

(e) 1 K. & J. 417.

(i) 9 Hare, 737.

(g) 28 Beav. 53.

Mount, (a) *Hotchkin v. Humfrey*, (b) *Jeffery v. Jeffery*, (c) *In re Wollaston's Settlement*. (d)

Mr. Bedwell (*Mr. Malins* with him), for the trustees, took no part in the argument.

Mr. Rasch, for the defendant Walter Farquhar Larkins, in support of the decree under appeal, contended that the language of the settlement was ambiguous, and that the rule laid down in *Woodcock v. The Duke of Dorset* (e) and *Howgrave v. Cartier* (g) applied; and added to the authorities already mentioned the cases of *Torres v. Franco*, (h) *Clayton v. The Earl of Glenyall*, (i) *Bulmer v. Jay*. (k)

Mr. Bacon and *Mr. Martineau*, for the defendant George Maddox, took the same line of argument, and contended that the verbosity of the settlement arose from the draftsman's fear of interfering in any way with the life-estates given to the husband and wife.

Mr. Greene replied.

* 253 * During the arguments, the Lord Justice KNIGHT BRUCE remarked that he never could understand the meaning of Lord THURLOW's concluding words in *Woodcock v. The Duke of Dorset*, (l) "the intention of the settlement is the truth and honor of the case;" and the Lord Justice TURNER remarked that Lord ELDON's criticism in *Hope v. Lord Clifden* (m) on Lord THURLOW's decision was expressed before the real terms of the settlement in that case (n) were known.

At the conclusion of the arguments their Lordships delivered their judgments as follows:—

(a) 19 Beav. 292.

(d) 27 Beav. 642.

(b) 2 Madd. 65.

(e) 8 Bro. C. C. 569.

(c) 17 Sim. 26.

(g) 3 Vea. & Bea. 79; S. C., G. Coop. 66.

(h) 1 Russ. & Myl. 649-654.

(l) 3 Bro. C. C. 569, 571.

(i) 1 Dr. & War. 1.

(m) 6 Ves. 499.

(k) 3 Myl. & K. 197.

(n) See 3 Vea. & Bea. 82, note (c); G. Coop. 73, note (c).

THE LORD JUSTICE KNIGHT BRUCE. — Upon the construction for which the appellant contends the son who attained majority and his family would have been equally excluded, if that son, instead of dying a bachelor, had died in his father's lifetime leaving a widow and children surviving the father. Neither upon principle nor upon authority, considering that the instrument was a prenuptial settlement, is it possible to adopt such a construction in the absence of words absolutely compulsory. If the words are absolutely compulsory, they must be submitted to, but not otherwise.

It seems to me that, looking at the whole of this remarkable instrument, which contains a much greater quantity of words than of meaning, we may account for the almost marvellous iteration of the survivorship of the two parents by the anxious wish of the framer to show * that the two parents and the survivor * 254 were to enjoy every thing until the decease of the survivor, whatever number of children there might be. To that intention, to that nervousness, — if I may use such an expression, — do I ascribe, agreeing as I do with *Mr. Bacon's* argument, the repeated mention of that circumstance; and taking, as we must take, the whole of that instrument in all its singular clauses from beginning to end together, an intention is not, in my judgment, exhibited to exclude a child who should attain his majority in the father's lifetime, although not surviving the father or mother.

Accordingly I arrive at the Vice-Chancellor's conclusion; and while I fully acknowledge the high authority of the case of *Woodcock v. The Duke of Dorset*, (a) I believe that I should have myself decided this case in the same way had *Woodcock v. The Duke of Dorset* never existed.

THE LORD JUSTICE TURNER. — I agree.

From the very nature of this instrument it must be considered that the intention of the parties to it was to provide for the children of the marriage at the time when those children would require provision to be made for them. Both upon principle and upon authority, the cases have all been dealt with upon that consideration. No doubt there are very awkward words to deal with in this settlement; but the argument on the part of the appellant rests upon two points; first, upon the gift over, which is said to be the

(a) 3 Bro. C. C. 569.

key to the settlement; and secondly, upon the use of the
* 255 words, "after the decease * of the survivor of" the husband
and wife, where they occur in the settlement.

It is not disputed that if it was clear on the first part of the settlement that these children were to take vested interests at twenty-one or marriage, then the circumstance of there being a gift over in case the children should depart this life in the lifetime of the parents would not destroy the vested interests of the children at twenty-one or marriage; therefore the real question to be considered seems to me to be, whether upon the earlier part of the settlement there is not clear indication of intention that the children should take vested interests at twenty-one or marriage, notwithstanding that they might afterwards die in the lifetime of their parents.

With all respect to the argument on the part of the appellant, I take it to be reasonably clear that upon the true construction of this settlement, if we look only to the first trusts which are declared in favour of the children, each child would take from its birth a vested interest; and the difficulty arises upon the clause which provides for the vesting, and which is in these terms: "And it is hereby declared and agreed by and between the said parties hereto, that the share or shares of such child, if only one, or children if more than one, shall become and be deemed a vested and transmissible interest (being a son or sons) at his or their age or respective ages of twenty-one years, or (being a daughter or daughters) at her or their age or respective ages of twenty-one years, or day or days of marriage respectively, which shall first happen after the decease of the survivor of the said Harry Meggs Graves and Louisa Seton Larkins."

What was the purpose of that clause? It was, as I
* 256 * conceive, inserted for the purpose of preventing the operation of the direct trusts for the benefit of the children giving a vested interest to each child upon its birth, by declaring that the children should take vested interests only at twenty-one or marriage. The object, therefore, of the clause was to alter the time at which the interests of the children were to vest; it was not to alter the class of children who were to take. It did not mean that no child should take who did not survive the parents, but it meant that no child should take except in the event of attaining twenty-one, or being a daughter attaining that age or

marrying. If we were to adopt the construction contended for on the part of the appellant, the effect would be to alter the class of children to take, and not merely the periods at which those who do take are to take vested interests.

It seems to me that this is a most unreasonable' and unnatural construction to give to these words, and we must, therefore, see whether some other construction cannot be given to the words, "after the decease of the survivor of the said Harry Meggs Graves and Louisa Seton Larkins;" and I agree with my learned brother, that the true meaning of these words upon the whole settlement must be, that, notwithstanding the vesting at twenty-one or marriage, nothing contained in that clause should interfere with the prior interests created by the settlement.

I think that is a reasonable construction for those words; and I should be deviating, both from principle and authority, if I were to hold that the children who attained twenty-one in the lifetime of the parents were not entitled under the settlement.

I agree with the opinion of the Vice-Chancellor on * this * 257 part of the case, and the appeal in this respect must therefore be dismissed.

In the Matter of ELIZABETH STABLES, a Person of unsound Mind;

AND

In the Matter of The LUNACY REGULATION ACT, 1862.

1864. February 10, 13, 24. Before the Lord Chancellor Lord WESTBURY.

The Lunacy Regulation Acts of 1853 and 1862 contain no machinery by means of which a conveyance of the legal estate of a married woman of unsound mind in freehold property can be obtained; and in a case where this was sought an order was made simply directing a sale, and declaring all beneficial interest of the married woman bound by the order.

THIS was a petition presented in the above matters by Edwin Stables, the husband of Elizabeth Stables, a person of unsound mind not so found by inquisition.

It stated, in effect, the wife's unsoundness of mind; that no settlement had been executed on the marriage; that the wife was

entitled, subject to such estate as the petitioner had therein, to an undivided thirteenth share of two freehold properties, the value of which share was under 1000*l.*, and its annual value was about 13*l.*; that the cost of the lunatic's maintenance was nearly 70*l.* a year, which the petitioner was unable to pay, but that if her share were sold, and out of the proceeds 35*l.* were paid to the petitioner for her past maintenance, and the residue of the proceeds were invested, and out of the capital and income 35*l.* a year were paid towards the lunatic's future maintenance, the petitioner would then pay the remainder of the annual sum of 70*l.* required for her maintenance; that it was desirable and for the lunatic's benefit that her share should be sold to provide for her maintenance; and that agreements had been entered into by the persons interested

in eleven of the other thirteen shares of the property on
 * 258 behalf of * themselves, and so far as they could on behalf of the other two owners (who were lunatics), for the sale of the entirety of the properties on terms very beneficial to every person interested in the proceeds of sale, but with a condition enabling the vendors to rescind the contracts in case of inability or unwillingness to make out the title or carry out the contracts.

It prayed for the sale of the share of the lunatic, or of the lunatic and her husband in her right, in the properties, and asked that the contracts for sale might be carried out on her behalf, and for an authority to the petitioner to concur with the other parties interested in the sales, and to receive and give receipts for the lunatic's share of the purchase-moneys, and to execute the necessary conveyances of her share or concur in conveying the entirety and do all acts necessary for completing the sales; and for liberty, out of the lunatic's one-thirteenth of the purchase-moneys, to pay one-thirteenth of the costs of the sales and pay the costs of the present petition when taxed.

By the 12th and 13th sections of the Lunacy Regulation Act, 1862, under which the petition was presented, powers are given to the Lord Chancellor sitting in Lunacy, where the property of a person of unsound mind not so found by inquisition does not exceed 1000*l.* in value or 50*l.* per annum, to apply it for his or her benefit in a summary manner without inquisition, and also to sell his or her land or other property for his or her benefit. The exact terms of these sections are set out above. (a)

(a) Page 182, note (a).

The petition was brought before the Lord Chancellor * with the sanction of the Lords Justices before whom it * 259 had been originally brought, there being no precedent to be found in Lunacy for the sale of the estate of a married woman who was lunatic, and their Lordships doubting whether the large language of the Act of 1862 would render a conveyance of a married woman's estate valid without the examination and acknowledgment required by the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74.

Mr. Charles Wood, for the petitioner, arguing to the effect stated in the Lord Chancellor's judgment, referred to the sections of the Lunacy Regulation Act, 1862, just mentioned, and also to the 17th section of that Act. He further commented on the 2d, 116th, and 139th sections of the Lunacy Regulation Act, 1853, and the 77th, 79th, and 80th sections of the Fines and Recoveries Act, Stat. 3 & 4 Will. 4, c. 74. These enactments, so far as they are material, are respectively set out below. (a)

(a) Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86), § 17. "Every conveyance, transfer, charge, or other disposition made or executed by virtue of this Act, and every payment made in pursuance of this Act, shall be valid to all intents, and binding upon all persons whomsoever; and this Act shall be a full indemnity and discharge to the governor and company of the Bank of England, their officers and servants, and all other persons respectively, for all acts and things done or permitted to be done in pursuance thereof, or of any order of the Lord Chancellor intrusted as aforesaid made or purporting to be made under this Act; and such acts and things respectively shall not be questioned or impeached in any Court of Law or Equity to their detriment."

Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), § 2. "In this Act, unless there be something in the subject-matter or context repugnant to the construction, —

"And the word 'conveyance' shall be construed to comprehend any release, surrender, assignment, or other assurance, including all acts, deeds, and things necessary for making and perfecting the same; . . ."

Sect. 116. "Where it appears to the Lord Chancellor intrusted as aforesaid to be just and reasonable, or for the lunatic's benefit, he may order that any estate or interest of the lunatic in land or stock, either in possession, reversion, remainder, contingency, or expectancy, be sold, or charged by way of mortgage, or otherwise disposed of, as may to him seem most expedient, for the purpose of raising money to be applied, and may accordingly order that the money when raised be applied for or towards all or any of the purposes following: —

1. The payment of the lunatic's debts or engagements;
2. The discharge of any incumbrance on his estates;

February 24.

* 260 * THE LORD CHANCELLOR. — The question which arises upon this petition is whether, in the event of a sale taking

3. The payment of any debt or expenditure incurred or made after inquiry, or authorized by the Lord Chancellor intrusted as aforesaid to be incurred or made, for the lunatic's maintenance or otherwise for his benefit ;

4. The payment of or provision for the expenses of his future maintenance ;

5. The payment of the costs of applying for, obtaining, and executing the inquiry, and of opposing the same ;

6. The payment of the costs of any proceeding under or consequent on the inquiry, or incurred under order of the Lord Chancellor intrusted as aforesaid ; and,

7. The payment of the costs of any such sale, mortgage, charge, or other disposition as is hereby authorized to be made.

And the committee of the estate may and shall, in the name and on behalf of the lunatic, execute, make, and do all such conveyances, deeds, transfers, and things relative to any such sale, mortgage, charge, or other disposition as aforesaid, and for effectuating this present provision, as the Lord Chancellor intrusted as aforesaid shall order."

Sect. 139. "Every surrender, lease, agreement, deed, conveyance, mortgage, or other disposition granted, accepted, made, or executed by virtue of this Act shall be as valid and legal to all intents and purposes as if the person in whose name or place, or on whose behalf the same was granted, accepted, made, or executed, had been of sound mind, and had granted, accepted, made, or executed the same."

Fines and Recoveries Act (3 & 4 Will. 4, c. 74, § 77). "That after the thirty-first day of December one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this Act, by deed to dispose of lands of any tenure and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as herein after directed. . . ."

Sect. 79. "That every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a Judge of one of the superior Courts at Westminster, or a Master in Chancery, or before two of the

place of the undivided thirteenth * share which is vested * 261 in the petitioner and his wife in her right, a conveyance can be made which shall be effectual to pass the legal estate.

Under the 13th section of the Lunacy Regulation Act, 1862, I have the same powers of selling and conveying this undivided portion of freehold estate belonging to this married woman, as I should have had if she * had been found a lunatic by * 262 inquisition. The powers there referred to are those given by the Lunacy Regulation Act, 1853, § 116, and my first impression was that the concluding words of that section were sufficient to enable the Lord Chancellor, intrusted with the jurisdiction in Lunacy, to confer upon the committee of the estate a statutory power under which the whole estate and interest legal and equitable of the lunatic might be effectually conveyed. If, however, as the Act says, the conveyance to be made is to run "in the name and on behalf of the lunatic," it cannot be considered to be made in the exercise of any statutory power, but it must be such a conveyance as the lunatic, if of sound mind, would himself or herself have been able to make.

But then *Mr. Wood*, calling my attention to the definition of the word "conveyance" as used in the Act of 1853, contained in the second section of that Act, argues that it includes the acknowledgment which is imposed in the case of a conveyance by a married woman by the Fines and Recoveries Act as being a necessary act for perfecting the conveyance.

That argument, however, would lead to the conclusion that the committee of the estate must himself vicariously perform these acts which by the Fines and Recoveries Act the married woman is directed to perform before her conveyance can be effectual, and as the condition for such conveyance taking legal effect; and I can-

perpetual commissioners, or two special commissioners, to be respectively appointed as herein after provided."

Sect. 80. "That such Judge, Master in Chancery, or commissioners aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this Act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consents to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void."

not hold that the Act of 1853 intends that the committee of the estate is to produce a deed before one of her Majesty's Judges or before the commissioners, and make an acknowledgment and go through all those ceremonies which are prescribed to be observed by a married woman, and without the observance of which the conveyance by the married woman takes no effect at all.

* 263 *The legislature could not have intended, and I cannot hold it to have intended or construe the statute as enacting; that these solemnities and ceremonies, if they cannot be gone through personally, should be gone through by the committee of the estate of the married woman vicariously in her name and on her behalf; that every ceremony which can be performed by any person, if of sound mind, may be done by the committee vicariously, if duly authorized and empowered by that other person. Any vicarious execution of this kind must be assimilated to an execution by an attorney legally authorized to act. The statute must be held as giving to the committee all such powers in the name and on behalf of the married woman as can be properly exercised by her representative or attorney. But the statute does not enable a married woman to be examined vicariously by her attorney, and I cannot therefore hold that these words of the statute, however large they may be, can mean that in the case of a married woman, being a lunatic, the Court is empowered under this authority to pass the legal estate, which cannot be taken out of the married woman otherwise than by the provisions of the Fines and Recoveries Act. I therefore am compelled to come to the conclusion that there is nothing in these Acts of Parliament touching the authority given to me in lunacy which enables me to direct this conveyance to be made, or enables me to order the committee to make a valid conveyance by observing those ceremonies and solemnities which the law requires in the case of a married woman.

All I can do, therefore, on this petition is to order the sale, with a direction that the petitioner shall, so far as he is able as representing his wife, concur in the conveyance, and a declaration that all the beneficial interests of the wife will be bound by

* 264 my order. That will *transfer and bind the beneficial interests in the property in question, and bind the estate of the wife in the hands of her heir, so as to compel him to give effect to the sale by a valid conveyance. The effect of such an

order will be to make to the purchaser a valid title, though it will not be effectual to convey to him the legal estate in this individual portion which at present is vested in this married woman.

The Lord Chancellor's order as drawn up (Entry of Orders, 1864, 1865, Book No. 118, p. 79), after a recital that it had been established to his Lordship's satisfaction that Elizabeth Stables was a person of unsound mind and incapable of managing her affairs, and that her property did not exceed 1000*l.* in value, was that Edwin Stables should be authorized to recover and receive the rents of the one-thirteenth share of Elizabeth Stables in the real estates mentioned in the petition until the time appointed for the completion of the sales in the petition mentioned, and one-thirteenth of the interest (if any) payable in case of non-completion. It then ordered that he should be also authorized "in the name and on behalf of the said Elizabeth Stables, to concur with the other parties interested in the" estates "in making and carrying out the" sales thereof, "and I do declare all beneficial interest of the said Elizabeth Stables in the said estate to be bound by this order." Her share of the purchase-moneys was then directed to be paid into Court; and upon such payment being made, Edwin Stables was ordered, "in the name and on behalf of the said Elizabeth Stables, so far as he has any power so to do by virtue of this order, to convey the said share of the said Elizabeth Stables in the said hereditaments * to the" purchasers. * 265 The reasonable cost, charges, and expenses of Edwin Stables of the petition, and incident thereto and consequent thereon, were directed to be taxed, and thereto was to be added one-thirteenth of his costs and expenses of the sales and the total amount certified and paid out of the moneys in Court. The remaining portions of the order are not material for the purpose of this report.

MACLEOD *v.* BUCHANAN.

1864. February 20, 27. Before the LORDS JUSTICES.

A stop order on a fund in Court, however general in its terms, is nevertheless confined in its operation to the specific portion of the fund in respect of a dealing with which the order is made.

A purchaser of a reversionary share of a fund in Court obtained a stop order extending in terms to the whole fund, and on a subsequent purchase of a further reversionary share in the fund obtained no further stop order. The vendor of this latter share subsequently created a charge upon it, the holders of which, after the reversionary share had fallen into possession, obtained a stop order upon the interest of the vendor in the fund. *Held*, that the holders of the charge were entitled to priority over the purchasers in respect of the vendor's share in the fund.¹

Per the Lord Justice TURNER. — Stop orders ought to be drawn up, as is the practice, so as to express in distinct terms upon the face of them that they affect only the share and interest of the party assigning.

THIS was an appeal by George Percy Elliott and Thomas Godfrey Sambrooke, directors and trustees of the General Reversionary and Investment Company, from part of an order made by the Master of the Rolls on three petitions presented to obtain payment out of Court of an aggregate sum of 3402*l.* 5*s.* 1*d.* consols, standing to the account of "Jane Macleod and her children," and of which Jane Macleod, now deceased, had been tenant for life, and the dividends thereon. The appeal had reference to so much of the order as, in respect of the reversionary share in the fund of Henry Robert Macleod, one of the children of Jane Macleod, expectant on the death of his mother, postponed with consequential directions the security made by him in favour of the society to that subsequently made by him in favour of Charles Augustin François Rousselle and Jacob Stier.

* 266 * The case in the Court below is reported in the 33d volume of Mr. Beavan's Reports, (a) where the facts are stated. The following statement of them is in substance taken from the judgment of the Lord Justice TURNER: —

The principal question in the case was that above mentioned, viz., as to the priority of incumbrances on the above-mentioned

(a) Page 234.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1696.

fund in Court standing to the account of Jane Macleod and her children, and it arose thus :—

Henry Robert Macleod, one of the children, being entitled to one-seventh part of the fund in remainder expectant on the death of Jane Macleod, by an indenture dated the 23d of April, 1847, assigned the one-seventh part to which he was so entitled to the trustees of the General Reversionary and Investment Company.

The trustees of the company did not obtain any stop order on the footing of this assignment, but they had before purchased the reversionary interest of Mary Anne Macleod, another of the children in the fund; and on the occasion of this purchase they had presented a petition in the cause jointly with Mary Anne Macleod, on which an order dated the 12th of March, 1846, was made, whereby it was ordered that no part of the fund should be sold out, transferred, or otherwise disposed of without notice to them.

Henry Robert Macleod afterwards, on the 5th of September, 1860, in consideration of a pre-existing debt, made another assignment, in the French language and form, whereby (according to the translation in evidence in the case) he assigned all his share “of a sum in reversion, the life-interest whereof was reserved by my late father * for the benefit of my mother, * 267 Mrs. Jane Buchanan, which sum is deposited in the Court of Chancery in England” — the original words being “la rente viagère constituée par feu mon père au profit de ma mère Madame Jane Buchanan, sur la Cour de la Chancellerie d’Angleterre” — to the respondents Charles Augustin François Rousselle and Jacob Stier; and on the 11th July, 1862, an order was made in the cause in Chambers on the petition of Messrs. Rousselle and Stier, Henry Robert Macleod appearing upon and consenting to the application, whereby it was ordered that no part of the share or interest of Henry Robert Macleod in the fund should be transferred, sold, or otherwise dealt with without notice to them.

Jane Macleod, the tenant for life, had in the mean time died on the 26th June, 1862; and petitions having been presented on her death for the distribution of the fund, the Master of the Rolls on the hearing of these petitions made the order under appeal, giving the assignment to Messrs. Rousselle and Stier priority over the assignment to the trustees of the company.

A further question was raised by the appeal, whether the assign-

ment to the respondents Messrs. Rousselle and Stier extended to the whole of the fund in Court, which was the aggregate of two funds; one of which was given by the will of the testator to Jane Macleod for life with remainder to her children; and the other of which was part of a fund which was originally given to Jane Macleod absolutely and became vested in her husband, but was as to this part (the husband having become bankrupt) settled by order of the Court upon the same trusts as those affecting the fund given by the will.

* 268 * *Mr. Selwyn* and *Mr. Beavan*, for the appellants. —

While on the one hand no negligence can be attributed to the company who obtained, in 1846, a general stop order upon the whole fund, there was, on the other hand, something very much like fraud in the manner in which, and not until after the death of the tenant for life, Messrs. Rousselle and Stier, with the connivance of Henry Robert Macleod, and, as we contend upon the documents in evidence, with notice of our stop order (for their order of 1862 referred to the accountant-general's certificate, which must have shown our stop order), obtained their special order. But that order was powerless to avoid the general order which the company had already obtained, and the nature of which was of itself sufficient to render it unnecessary for them to get further stop orders in respect of other subordinate interests in the fund. A stop order is a public notice which tells all the world that the person claiming it claims an interest in the fund stopped, and puts persons who thereafter intend to deal with the fund upon inquiry.

[THE LORD JUSTICE TURNER. — Is it not rather analogous to notice to a trustee? And if so, as in the case of a trustee there would be successive notices, should there not in the case of a fund in Court be successive stop orders?]

The whole doctrine of stop orders is new; and the first case upon them was *Greening v. Beckford*, (a) where, indeed, the term "stop order" was not used, and which was decided without argument, but evidently on the authority of *Dearle v. Hall* (b) and

(a) 5 Sim. 195.

(b) 3 Russ. 1.

Loveridge v. Cooper. (a) But the present case differs from *Greening v. Beckford* (b) in that there is here no evidence that Messrs. Rousselle and Stier made any inquiry at the accountant-general's office until * after the death of the tenant for life. * 269

[The Lord Justice TURNER referred to *Foster v. Blackstone.* (c)]

In fact, for an antecedent, and as it must be assumed a bad, debt they took as security what they could get: they in no way advanced their money on the faith of the fund being unincumbered.

[THE LORD JUSTICE KNIGHT BRUCE. — An antecedent debt may be a valuable consideration.]

It may, but at the time when these gentlemen took their security the interest of the company was a vested interest, and, as such, ought not lightly to be disturbed; *Cory v. Eyre*; (d) and our position of holders of a general stop order on the whole fund is analogous to that of a tenant in possession of an estate, into the nature of whose holding it behooves persons dealing subsequently to inquire, if they would be safe. *Daniels v. Davison*, (e) *Bailey v. Richardson*, (g) *Barnhart v. Greenshields*, (h) *Knight v. Bowyer*. (i)

On the other point, we contend that the words of the assignment to Messrs. Rousselle and Stier are not sufficient to carry to them the interest in so much of the whole of the aggregate fund here in question as was derived under the testator's will.

Mr. Baggallay and *Mr. George Simpson*, for Messrs. Rousselle and Stier, in support of the decision of the Master of the Rolls.

The order under appeal is right. The Court is, with respect to money standing in it, in the position of a trustee for the benefit of all parties; and a stop order is in the nature of notice to such trustee of the assignment which it is intended to protect. The stop order on its * face refers to the petition on which * 270 it is founded, which must consequently be looked to, which

(a) 3 Russ. 1, 30.

(b) 5 Sim. 195.

(c) 1 Myl. & K. 297.

(d) 1 De G., J. & Sm. 149, 167 extr.

(e) 16 Ves. 249.

(g) 9 Hare, 734.

(h) 9 Moore, P. C. Cas. 18.

(i) 2 De G. & J. 421.

is open to every one, and which, when so looked to, discloses the specific incumbrance in respect of which the application for the order is made. The mere fact, therefore, of the appellants having obtained a general stop order is nothing, for the generality of the order is cut down by the statements of the petition on which it is founded, so as to render it a protection only to the specific incumbrance in respect of which it was applied for. Indeed, it is only on admission or proof of the specific incumbrance that the order can be made: *Winchelsea v. Garrety*, (a) — a case, indeed, decided before, but which has been followed since the General Order of 3d April, 1841, (b) which was in force when the appellants obtained their stop order. And at the date of that stop order no assignment by Henry Robert Macleod was in existence; there was, consequently, no such assignment which could be protected by stop order; and these facts appearing on the search made by the respondents when they obtained their stop order, they were justified in treating this particular share as uncharged. The contention on the other side, if correct, would lead to the absurd result of enabling a person having a very small interest in one share of a fund to render all the other shares unmarketable; to say nothing of the difficulty of upholding such contention, when one of the objects of a stop order, viz., the taking the fund out of the order and disposition of the assignor, is considered. *Day v. Day*. (c)

On the second point, the words of the assignment to the
 * 271 respondents refer with exactness to neither portion * of the aggregate fund in Court, and therefore must, we submit, be taken to mean the whole fund.

Mr. Beaven, in reply. — At the conclusion of the arguments, during which, in addition to the authorities already mentioned, reference was made to *The Duke of Bolton v. Williams* (d) and *Peto v. Hammond*, (e) the case stood over in order that, before their Lordships delivered their judgments, the usual form in which stop orders were drawn up might be ascertained.

(a) 1 Beav. 223.

(b) Beav. Ord. Can. 161; Consolidated Orders, 26.

(c) 23 Beav. 391; 1 De G. & J. 145.

(d) 4 Bro. C. C. 297, 430; S. C., 2 Ves. Jr. 138.

(e) 30 Beav. 495.

February 27.

THE LORD JUSTICE KNIGHT BRUCE. — After some doubt in this case I have arrived at the conclusion of the Master of the Rolls as to the effect of the stop order of 1846, which was in its terms too large. It mentions, however, the petition upon which it was founded, and that petition, when read, shows the nature and extent of the assignment or assignments then existing, and what alone the stop order of 1846 could then have been properly intended to protect. It appears to me accordingly to have been only so far available, and the French securities of 1860, protected by the stop order of the 11th of July, 1862, must, I think, prevail over the assignment of the 23d of April, 1847, not protected, as I conceive, by any stop order.

The French documents, which are, perhaps, not * quite * 272 accurately translated, and are probably not originally free from inaccuracy, relate to matters of English form and law, and ought not to be very strictly criticized. Fairly construed, they seem to me to extend to Henry Robert Macleod's shares in each part of the fund as the fund existed on the 5th of September, 1860, without regard to the assignment of 1847.

THE LORD JUSTICE TURNER. — The principal question in this case is as to the priority of incumbrances on a fund in Court standing to the account of "Jane Macleod and her children." The question of priority arises thus: —

[His Lordship stated the facts with reference to the principal question in the case, and remarking that the assignment to Messrs. Rousselle and Stier clearly extended to part, and that for the purpose of the general question he would assume it to have embraced the whole fund, proceeded thus: —]

In my judgment, the decision of the Master of the Rolls is right upon this point.

It is true that the order obtained by the trustees of the company in point of form affected the whole fund, but it affected it in point of form only. Such orders, although they are drawn up as affecting the whole fund, do not of necessity show that the whole fund has been assigned; for every such order must affect the whole fund, as separate portions of the fund cannot be dealt with whilst

the whole fund remains undivided. The form of the order, therefore, cannot be taken to show the extent of the interest assigned; but for this information recourse must, if necessary, be had to the petition on which the order is founded, and which, of course, * 273 must in the body of it * disclose the assignment. In most cases, however, as in this, it is not necessary to resort to the body of the petition for this information, for either the assignor joins in the petition, as is the case here, or is served with it, and this appears upon the order itself, which thus shows by whom the assignment has been made.

It was urged for the appellants that the form of the order purporting to affect the whole fund was sufficient to put any subsequent incumbrancer upon inquiry; but, for the reasons above given, I am not satisfied that this could be so in any case, and I am quite satisfied that it could not be so in this case, as in my opinion the order obtained by the trustees must be taken on the face of it to have shown by whom the assignment was made, the assignor being a copetitioner.

It may be well to add upon this part of the case that the course which appears now to be generally adopted of drawing up these stop orders, so as to express in distinct terms upon the face of them that they affect only the share or interest of the party assigning, ought, in my opinion, to be continued, as it leaves no room for the doubt which has been raised in this case.

[His Lordship then stated the further question raised by the appeal, and proceeded thus: —]

This question of course depends upon the terms of the assignment to Messrs. Rousselle and Stier, and having regard to the terms of the assignment, and especially to the fact of there being no accurate description of either portion of the fund, I think the whole fund must be taken to be affected by it.

I think this appeal must be dismissed with costs.

* VICKERS v. BELL.

* 274

1864. February 29. March 1. Before the LORDS JUSTICES.

An executor who has not proved his testator's will may be made a party to a suit, provided he has acted as executor,¹ and it is not necessary, in order to maintain the bill against him, to prove that he has actually received money in the character of an executor.

Circumstances under which a person named as an executor in a will was held to have so acted as to render himself liable to account as an executor and pay costs as having joined in a vexatious defence.

THIS was an appeal by the defendant Robert Smith from so much of a decree of Vice-Chancellor STUART in a suit, instituted by a creditor, for the administration of the estate of Captain Charles William Bell, the testator in the cause, as in directing the usual accounts, and ordering the defendants to pay the costs up to the hearing, included the appellant in the scope of the order.

The debt of the plaintiff, who was a solicitor, was upon a guarantee for costs signed by the testator on behalf of his son-in-law, the Rev. Charles Edmund Fewtrell Wylde, whose affairs were involved in litigation.

The defendants in the suit were the testator's widow Elizabeth Bell, his daughter Cecilia Fewtrell Wylde, the widow of the Rev. Charles Edmund Fewtrell Wylde, who had died, and the appellant; these three persons having been, by the joint effect of the testator's will and codicil, made respectively in 1852 and 1856, appointed, with the Rev. William Brown, trustees and executors thereof.

The will and codicil were proved on the 6th of April, 1857, the testator having died in the preceding month, by the defendants Elizabeth Bell and Cecilia Fewtrell Wylde alone, power being reserved to make a grant of probate to William Brown and the appellant also when they should apply for it. (a)

* The bill, which was filed on the 1st of January, 1861, * 275 charged that the appellant had since acted as an executor

(a) The Act 20 & 21 Vict. c. 77 (of which see § 79), did not come into operation till January, 1858.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 252.

and as a trustee in the execution of the trusts of the testator's will, and had, by letter written to the plaintiff's solicitor, admitted that fact; but that William Brown had in no way acted, and sought simply the usual accounts but as against all the defendants.

The defendants Elizabeth Bell and Cecilia Fewtrell Wylde and the appellant were represented by the same solicitor in the suit, but nevertheless severed in their defence, and put in separate answers.

The answer of the respondents Elizabeth Bell and Cecilia Fewtrell Wylde set up as a defence and at considerable length the invalidity of the guarantee on which the plaintiff claimed against the testator's estate, and adverted to the fact that on the 12th of March, 1861, they had filed a cross-bill against the plaintiff in this suit as defendant to impeach it. They also, to the best of their respective belief, denied that the appellant had, since the grant of probate in April, 1857, acted as executor of the testator or as trustee in the execution of the trusts of his will, or that he had, by letter written to the plaintiff's solicitor, admitted the fact, or that William Brown had renounced probate or disclaimed. They further stated that, speaking to the best of their respective belief, neither William Brown nor the appellant had in any manner acted as the testator's executor or in the execution of the trusts of his will, and that they believed that they the answering defendants had become and were then the sole legal personal representatives of the testator.

The appellant, by his answer, stated in effect that after the testator's death the plaintiff's solicitor wrote to inform him
* 276 that the plaintiff held the guarantee above * referred to; that the appellant, although he had been the testator's solicitor from a time anterior of the date of the guarantee down to his death, had never heard of the guarantee before, and wrote to the respondent Cecilia Fewtrell Wylde for information about it; and that in reply to his application, she informed him that the testator had signed some paper at her husband's request, and which her husband had told her was a mere nominal thing; and that she added that her father was too ill at the time when he signed the said paper to understand what he was doing, and that she did not know what was its purport or effect. The appellant went on in the sixth paragraph of his answer, which was adverted to in the judgment of the Lord Justice TURNER, to say: "The said

Charles William Bell had had an attack of apoplexy shortly before the date of the said guarantee, and I verily believe that at the date of the said guarantee he was utterly incompetent to attend to or comprehend matters of business." He then went on to state in effect that at the time when he received the defendant Cecilia Fewtrell Wylde's reply to his application, he was carrying on business as a solicitor in partnership with his son at Richmond, in Surrey, under the firm of Smith & Son; and that the firm then acted as solicitors for the defendants Elizabeth Bell and Cecilia Fewtrell Wylde, who were the executors of the testator; and that upon receipt of the defendant Cecilia Fewtrell Wylde's said reply, the firm wrote to the plaintiff's solicitor the following letter: —

" Richmond, Surrey, Nov. 26, 1858.

" Dear Sir, — Mrs. Bell and her daughter Mrs. Wylde are the executrices of the late Captain Bell's will, and they have proved it.

* " They are both on the continent; and with reference * 277 to the undertaking signed by Captain Bell, Mrs. Bell informs us that it was obtained by fraud and misrepresentation, and was never read over or explained to him, he being completely deaf and blind, as you know; and at the time of signing it was slowly recovering from a fit of apoplexy.

" Knowing what sufferers they have been through Mr. F. Wylde, we cannot think that you will further embarrass them by any proceedings which would not benefit you.

" We are, dear Sir,

" Yours very faithfully,

" SMITH & SON.

" To John Philpot, Esq.,

" 20 Montague Street, Russell Square."

He then repeated, as from information gained from the defendants Elizabeth Bell and Cecilia Fewtrell Wylde, or one of them, the statements in their answer as to the circumstances under which the guarantee had been signed by the testator; admitted the reservation in April, 1857, of power to make a grant of probate to himself and William Brown, when they should respectively apply for it; and denied that he had ever acted as executor of the testator or as

a trustee in the execution of the trusts of his will. He admitted that, in answer to a letter of Mr. Philpot, the plaintiff's then agent, inquiring who were the executors of the testator, his firm wrote the following letter:—

“ Richmond, S. W.,

“ 7th April, 1857.

“ Dear Sir, — The executors of the will of the late Captain Bell are his widow and daughter and our Mr. Robert Smith.

* 278 * The will has been proved; but we have not yet received the probate. We act for the executors.

“ Very faithfully yours,

“ SMITH & SON.

“ John Philpot, Esq.”

He stated that, in so far as such letter might be considered as implying that he had proved the said will or was acting as an executor, the statement therein was erroneous, and that save and except the said letter of the 7th of April, 1857, and speaking to the best of his recollection and belief, he denied that he had, by letter written to the plaintiff's solicitor, admitted that he had acted in the execution of the trusts of the testator's will after the bill was filed; but that, before the interrogatories were delivered, he had informed the plaintiff's solicitor that he had never acted as an executor or trustee of the testator's will. He also stated that, to the best of his belief, William Brown had not renounced probate or disclaimed; but admitted that William Brown had not in any manner acted as executor of Charles William Bell, or in the execution of the trusts of the testator's will; and submitted that the defendants Elizabeth Bell and Cecilia Fewtrell Wylde became and were then the sole legal personal representatives of Charles William Bell.

He further stated in effect that he knew nothing about the testator's personal estate, but that he believed that the testator had a life-estate in some copyhold property at Richmond. He denied that any part of the personal estate had been possessed, got in, or received by him, or by his order or for his use, or that any part or parts thereof had been sold by him or under his order or authority; and he concluded by stating that he had never acted and did not

desire to act in the trusts reposed in him by the testator's
* 279 will, and he thereby disclaimed * such trusts, and all right,

title, interest, and powers in and by the will given to or vested in him.

The two answers having been filed on the 13th of March, 1861, and the cross-bill in *Bell v. Vickers* having been filed on the preceding day, the appellant in June, 1861, amended his bill, the amendments extending to very great length indeed, and being mainly directed to show the validity of the guarantee, which had been impugned in the answers and by the cross-bill. The amended bill in the original suit contained a special addition to the prayer of the original bill (which with an immaterial variation was allowed to remain in the amended bill), to the effect that it might be declared that the guarantee was absolutely binding upon, and that the amount due thereon ought to be paid out of the estate of the testator; or if for any reason the Court should be of opinion that the same was not as against all persons binding upon the testator's estate, then that it might be declared that the same was valid and binding upon the testator's estate as against the defendants Elizabeth Bell and Cecilia Fewtrell Wylde, and to the extent of the estate of interest therein to which the said defendants respectively were (or but for the sum required to pay such guarantee would have been) entitled.

The amended bill retained the charges as to the appellant having acted as executor, and as to his having admitted the fact, and as to William Brown's not having acted, which are above referred to; substituted for an allegation in the original bill that the defendants had got in and possessed themselves of the testator's personal estate to a considerable amount, an allegation that the respondents Elizabeth Bell and Cecilia Fewtrell Wylde had done so with the appellant's privity, and added a statement that the appellant "now alleges that he has not received any part of the estate of the said testator."

* It did not, in point of fact, appear that the appellant had * 280 received any part of the testator's estate.

An answer of the respondents Elizabeth Bell and Cecilia Fewtrell Wylde having been put in to the amended bill, to which the appellant was not interrogated, evidence was gone into on both sides. That in opposition to the plaintiff was described as "filed on behalf of the defendants," and included an affidavit of the appellant supporting the case of the respondents Elizabeth Bell and Cecilia Fewtrell Wylde.

The general scope of the evidence in the case appears from the judgments of the Lords Justices.

At the hearing the Vice-Chancellor upheld the guarantee, and, thinking the defence which had been set up vexatious, made the decree now under appeal.

The appeal being in form an appeal from part only of the decree of the Court below,

Mr. Bacon, for the appellant, claimed the right to begin.

Their Lordships, however, held that the appellant's appeal was in fact an appeal from the whole decree of the Court below, so far as it concerned him, and that the plaintiff's counsel ought to begin.

Mr. Malins, *Mr. Greene*, and *Mr. E. F. Smith*, for the plaintiff, accordingly began, and contended that the decree of the Court below was right. The appellant had sufficiently accepted and acknowledged that he had accepted the position of executor, and therefore was properly made a defendant, although he had not proved. It was right also to make him pay costs, as he

* 281 had actively * participated in the vexatious defence set up by the defendants Elizabeth Bell and Cecilia Fewtrell Wylde.

They referred to *Hensloe's Case*, (a) *Webster v. Spencer*, (b) *Davies v. Williams*, (c) *Dyson v. Morris*, (d) *Strickland v. Strickland*, (e) *Lowe v. Jolliffe*, (g) *Cummins v. Cummins*, (h) *Long v. Symes*. (i)

Mr. Bacon and *Mr. Druce*, for the appellant, argued that the decree of the Court below was wrong. Whatever the appellant might have done was done *alio intuitu*, and with no intention of investing himself with the character of an executor, and he ought not to have been made a defendant to the original bill; still less to the amended bill filed, as that had been, after his answer had been put in denying on oath that he had acted. It was a mistake, too, on the facts to say that he had actively participated in the defence of the other defendants. That he defended the suit separately was evidenced by the fact of his having put in a separate

(a) 9 Rep. 36 b.

(b) 3 B. & Ald. 360.

(c) 1 Sim. 5.

(d) 1 Hare, 413.

(e) 12 Sim. 253.

(g) 1 Wm. Bl. 365.

(h) 3 Jo. & Lat. 64.

(i) 3 Hagg. Ecc. Cas. 771.

answer, and the plaintiff was answerable for the statements contained therein, as he alone was responsible for the form of the interrogatories to which such statements were answers.

A reply was not heard.

THE LORD JUSTICE KNIGHT BRUCE. — There are two questions upon this appeal, — one a question of pleading, the other a question of evidence.

* With regard to the first, the actual state of the record, * 282 the original bill having received considerable amendments, is such as to throw some obscurity round it, namely, whether the record in its actual state has a case upon it charging the appellant with having accepted the executorship and acted as executor, so as to make himself liable to account. Comparing the original bill with the amended bill, I felt for some time difficulty as to this; but on looking at the whole record, I think that it would be too strict so to deal with the matter, and, in my judgment, it is not an unfair or improper interpretation of the bill in its actual shape to read it as seeking in due formality to charge the appellant as an executor.

Then as to the question of evidence; for although power was reserved to the appellant to come in and prove the will when the executrixes proved it, he has not exercised that power, and has not proved the will; neither, on the other hand, has he renounced in the Ecclesiastical Court. A question was raised as to the admissibility in evidence against him of the testator's pass-book. I think it not necessary to give, and I decline giving, an opinion upon that point. It may, in my judgment, for every present purpose, be assumed either way. But there is the correspondence of April, 1857, which *prima facie* I think enough to charge the appellant; to which is to be added the active and leading and prominent part which he has taken in opposition to the demand of the plaintiff in the suit.

Taking those circumstances together, the Vice-Chancellor's conclusion was, in my judgment, right; and both in point of pleading and evidence, the appellant stands before us as an executor liable to account. Considering, however, the state of the pleadings and the documents, and subject to the right of the plaintiff's counsel

- * 283 * to reply if they desire it, it does not appear to me that the appeal should be dismissed with costs.

THE LORD JUSTICE TURNER. — I also think that this decree is right.

In point of pleading, I apprehend that an executor who has not proved the will may be made a party to a suit, provided he has acted as executor; and I do not think that for the purpose of maintaining the bill against him it is necessary to prove that he has actually received money in the character of executor. I think it is sufficient to say that he has acted. No doubt receiving money is a proof of acting, but I think it is by reason of the acting, and not by the receipt of the money, that he becomes a proper party to the suit, and I take this to be really no more than what the rule of law is. As I understand that rule of law, it is this: that although when executors are plaintiffs, both those who have proved and those who have not proved must sue; yet when executors are sued, then, as against those who have not proved, the action could not be maintained without an allegation that they have acted.

The real question is, whether the defendant can be said to have acted in this executorship.

I think there is enough to show that he has. Consider the letter of the 7th of April, 1857. An application is made to him on behalf of a creditor to know who has proved the will, and his answer is, "The executors of the will are his widow and daughter and our Mr. Robert Smith," averring himself to be an executor.

- * 284 * Again, a good deal has been said in the course of the argument upon the subject of the appellant taking upon himself the substantial defence of the suit, and alleging matters which are in opposition to the claim of the plaintiff. I think that he has done so upon his answer. That answer does not, as his counsel urge upon us, merely allege that he has been so informed by the wife and by the daughter, but it carries the case further.

[His Lordship then referred to the 6th paragraph, which is stated above, and proceeded thus :—]

If the appellant had intended merely to say "they have told me so and so," and had said, in answer to the interrogatories that were put, "I have been told that he had an attack of apoplexy, and that at the date of the guarantee he was utterly incompetent, but I know nothing about it," it might be consistent with his not putting in issue any thing in opposition to the claim of the plaintiff. But when he says distinctly that he believes that at the date of the guarantee the testator was utterly incompetent to attend to or comprehend matters of business, it is impossible, I think, to look at that in any other point of view than an actual insistence by him on that defence.

I am not, however, disposed to rely to any great extent upon that passage of the answer, because I think we must look at the case as it is stated in order to see what he had done at the institution of the suit, and, therefore, I am not disposed to decide the case upon the ground alone that he defended the suit; but I think the fact of his putting this allegation upon his answer is strong evidence confirmatory of what he had done by the letter of the 7th of April, 1857, whereby he acknowledged himself to be an executor and took upon himself the executorship. I doubt whether, after that letter, he could have renounced * probate. I doubt * 285 very much whether the Ecclesiastical Court would not, upon that letter, have compelled him to accept probate if applied to for that purpose.

It is not, however, necessary to go so far. I think the result of the evidence, regard being had to that letter, followed as it was by the course he had taken in this suit, is sufficient to show that he has acted as executor, and sufficient, therefore, to support this decree against him.

I think, however, the case was one of some doubt, and that it was properly brought before this Court, and that, therefore, the appeal should be dismissed without costs.

1864. January 10. February 10, 24, 27. March 5. Before the Lord Chancellor Lord WESTBURY.

A lease contained a covenant on the part of the lessees to "rebuild" a new house and premises on the site of the demised messuage, which they covenanted to pull down: *Held*, —

1. That the covenant did not involve any obligation to erect the new house in the same manner and in the same style and shape and with the same elevation as the old building.
2. That even if it did, the implication would have been rebutted in the case before the Court, inasmuch as the covenant stipulated that the new house and premises should be suitable for a purpose to which the old building was not applied.

The lease also contained an agreement that such of the windows and lights in the new house and premises as occupied the site of ancient lights were to be considered as and should have all the rights of ancient lights. *Held*, that this was merely an agreement between the parties, amounting to an engagement by the lessees that, so far as they were concerned, and so far as they were owners of the adjoining property, the lights of the windows of the new house which should occupy the site of ancient lights should have the character of ancient lights; and that the extent of the covenant must be limited to such rights and such estate and interest as the appellants themselves might possess in the adjoining land.

The lease further contained a provision that certain entrances from the demised messuage and the yard in its rear into an adjoining court and gateway, and the right of carriage-way in respect of the messuage through such court should be preserved. *Held*, that the covenant must be construed with reference to the right of way and the user of the right of way which had existed as far back as could be traced by evidence in respect of the demised premises.

The assistance afforded by the Court of Chancery by way of mandatory and prohibitory injunction in aid of specific performance is a jurisdiction the exercise of which is eminently discretionary, and ought to be guided and measured by what substantial justice requires as between the parties.

Circumstances under which, by reason of a reasonable offer made by the defendants, and upon terms, the Court declined to exercise the jurisdiction.

Observations on the duty of the Court clearly to lay down, by the language of its injunction, what it permits and what it prohibits.¹

Liberty should not be given to a plaintiff, in a suit for a mandatory and prohibitory injunction in aid of specific performance of a building agreement, to apply to the Court in the event of the defendants erecting any wall or building which should prevent free access of light and air. Either the application for such liberty is premature, in which case the liberty ought

¹ See Kerr Inj. 623, 624; 1 Joyce Inj. 63, 64.

not to be given; or if reason for the application afterwards arises, it must be the subject of independent proceedings.

THIS was an appeal by the defendants from an order made at the hearing of the cause by the Vice-Chancellor Sir WILLIAM PAGE WOOD, granting, with costs up to the hearing, an injunction to restrain the appellants from building or continuing the wall, in the *pleadings described as the main back wall, of a *287 messuage covenanted to be rebuilt by them on the site of No. 27 Mincing Lane, otherwise than on the same site and extending over the same site as was formerly occupied by the main back wall of an original messuage formerly standing on the site, and which had been pulled down by the appellants under a covenant for that purpose; and also from erecting the new messuage in such manner as not to preserve the back entrance into a court and gateway called Bell Court or Yard, and the right of carriage-way in respect of the messuage through Bell Court; with liberty to the respondent, the plaintiff in the cause, to apply to the Court as he should be advised in the event of the appellants erecting any wall or building either on the demised premises or on the property of the appellants, which should prevent the free access of light and air to such of the windows of the newly-erected house as might occupy the site of the ancient lights of the messuage No. 27 Mincing Lane.

The facts of the case, as also the scope of the arguments, sufficiently appear from the Lord Chancellor's judgment.

Mr. Rolt and *Mr. Jessel* appeared for the respondent; and

Sir Hugh Cairns and *Mr. Cotton*, for the appellants. — Reference was made to *The Attorney-General v. The Sheffield Gas Consumers Company*; (a) *Walter v. Selfe*, (b) in which case Lord ST. LEONARDS was stated by *Mr. Rolt* to have expressed his opinion that if the existence of a nuisance was admitted, he would not go into the question of degree but would grant the injunction.

Lumley v. Wagner, (c) *The Rochdale Canal Company v. King*, (d) and *Isenberg v. The East India House Estate Company, Limited.* (e) *288

(a) 3 De G., M. & G. 304.

(b) On appeal, mentioned in 4 De G. & S. 326.

(c) 1 De G., M. & G. 604.

(e) 3 De G., J. & Sm. 263.

(d) 2 Sim. N. S. 78.

* 291 forcing specific performance of an engagement such as * this, the jurisdiction it exercises is in an eminent degree discretionary, and ought to be guided and measured by what substantial justice shall require as between the parties. In the present case the appellants ask to have the injunction dissolved on the ground of an offer made by them, which offer will have the effect of putting the respondent in as favourable a condition, or rather in a more favourable condition, than if the wall had been erected on the respondent's own land; and I am disposed to think that if that offer can be carried into effect the Court ought not to interfere to compel a pulling down of the wall which has been already erected, or to restrain the completion of that building.

But then a considerable difficulty arises in the respondent's apprehension at least, which is this: He says that the windows which will be constructed in the new back front, if it be built not in conformity with the covenant, will lose the advantage of ancient lights. This argument, however, is in a great degree unfounded, and I do not feel much difficulty from this circumstance; for the character of ancient lights is here to be preserved only by means of the appellants' covenant and grant, and it will be as easy to invest the lights in the back wall, which is at present in the course of construction, with the character of ancient lights, as it would have been to invest the windows with that character if the main back wall had been erected upon the site of the respondent's land.

But the real difficulty lies in giving an intelligible meaning to the words of the covenant; and inasmuch as I propose to abstain from exercising the jurisdiction of the Court by way of injunction on the ground of a reasonable offer being made by the appellants,

I must put them to enlarge that offer, so as to take in this * 292 question of ancient * lights, and to adopt words in their undertaking which shall render more intelligible and more effective the words of the covenant than they in their present condition appear to me to be.

To proceed by steps in my decision, I will read at once that portion of the order I propose to make, which addresses itself to the portion of the case which I have already mentioned.

[His Lordship then read as follows: "The appellants undertaking at their own expense to make out a good title to and to convey to the respondent, subject to the lease, the fee-simple of so much of

the land occupied by and included within the east main wall of the new house erected under the lease as is not demised by the lease ; and also to grant the necessary right of support to such wall from the adjoining land ; and also undertaking at their own expense to make out a good title to and to convey to the respondent, subject to the said lease, the fee-simple of any land not belonging to the respondent which shall be made the site or part of the site of any new buildings erected on that which was the court at the rear of the demised house that has been pulled down ;” and proceeded thus : —]

That relates to a complicated state of things arising in this way, that at the back of the demised house there was a court, part of which belonged to the respondent and part did not. The whole of it now is vested in the appellants, who propose to cover, by out-buildings to the new house, a small part of the court which they have acquired, and which did not originally belong to the respondent. But if they choose to put buildings which they erect under the lease partly on land belonging to themselves, which does not belong to the respondent, * then, as the buildings * 293 are entire, I must put upon them the obligation, which is in conformity with their own offer, of conveying to the plaintiff so much of their own land as they have chosen thus to occupy.

[His Lordship then resumed reading his order thus : “ And the appellants also undertaking at their own expense to grant to the respondent that such of the windows and lights of the east main wall of the said new house as occupy the same site or relative position or place therein as the ancient lights did in the old east main wall of the house pulled down shall be considered as, and have all the rights of, ancient lights : declare that when and so soon as such undertakings respectively have been performed, the injunction granted by the said decree whereby the appellants are restrained from building or continuing the wall in the pleadings described as the main back wall of the messuage to be rebuilt on the site of No. 27 Mincing Lane, otherwise than on the same site and extending in the same line as was formerly occupied by the main back wall of the original messuage, ought to be dissolved, and let the same be dissolved accordingly ; and proceeded as follows :]

In the undertaking which I have thus expressed with regard to these new windows, a controversy may hereafter arise as to what windows in the new building will occupy the same site, or, as I have expressed it, will have the same relative position or place in the new back front as the windows had in the old back front ; and I therefore propose to add to this part of my order a direction for the determination of any question arising thereon by arbitration precisely in the manner in which any question arising upon the new building under the lease is by the lease provided to be * 294 determined. And upon * the undertakings which I have read being given and performed the injunction, to the extent which I have read, will be dissolved ; but it must remain till those undertakings have been performed, the undertakings being in both cases the making out of the title or right to make certain grants, and completing those grants. If there shall be any delay or any question arising upon the performance of these undertakings, application must be made to me and I will deal with it, at the expense of course of the party whom I shall find in the wrong.

But the injunction granted by his Honor proceeds in its second division, whereby the appellants are restrained from erecting the messuage in such manner as not to preserve the back entrance into the court or gateway called Bell Court or Yard, and the right of carriage-way in respect of the messuage through Bell Court, to deal with a further intricate and difficult matter.

It appears that along the southern side of the messuage demised, in a line from west to east, runs a species of carriage-way, being the entrance into a court called Bell Court, through which there was no thoroughfare. The entrance to this carriage-way was by an arch, over the upper part of which a portion of the house was built. I do not find it in evidence that the appellants have persevered in any design of altering the gateway, although there appears to have been originally some intention on their part so to do ; and probably that intention having been once entertained it may be right to put them upon some undertaking, if I relieve them from this part of the injunction. The carriage-way running, as I have said, along the southern side of the house, there were two doorways opening, the one from the house and the other from the yard into the carriage-way.

* 295 * In this state of things the appellants propose to block

up the carriage-way at the end of eight feet, measured from the easternmost end of the furthest door; and they propose in some slight degree to narrow the width of the carriage-way beyond—to the east, that is, of—that doorway, but still to preserve it to the width of twelve feet. The question is, whether so to do will be a sufficient compliance with the covenant contained in the lease, by which it is provided, that the entrance from the messuage into the court and gateway known as Bell Court and the right of carriage-way in respect of the messuage through Bell Court shall be preserved.

I think it reasonable to construe these words with reference to the right of way and the user of the right of way which have existed as far back as can be traced by evidence with respect to this house; and I find that the only use which has been made of this carriage-way by the occupants of the house has been by backing carts to the furthest doorway, that is, the easternmost entrance in the yard of the messuage, whenever it was necessary to carry in a cart any thing that was required by the occupiers of the house. I find, also, that the road, so far as it is proposed to be preserved by the appellants, will be amply sufficient for all the purposes for which the road can be found to have been ever used.

In my judgment, therefore, it would be wrong, for many reasons, to continue the injunction as granted by the learned Vice-Chancellor.

The first duty of the Court in granting an injunction of this kind is to lay down a clear and definite rule. If the language of the order in which the injunction is contained be itself ambiguous, uncertain, indefinite, giving no clear rule of conduct, the injunction becomes * a snare to the defendant, who violates * 296 it, if at all, at the peril of imprisonment. The Court therefore should, in granting an injunction, see that the language of its order is such as to render quite plain what it permits and what it prohibits.

Testing the language of the present injunction as granted in this particular by this rule, the appellants are only restrained from acting in such manner as not to preserve the back entrance. What is meant by preserving the back entrance? If it be slightly contracted, still, however, remaining sufficient for every purpose of a back entrance, is it preserved or is it destroyed within the meaning of this injunction? What, again, is meant by preserving the

right of carriage-way in respect of the messuage through Bell Court? There was no carriage-way through Bell Court at all. Nor is it possible to tell whether the smallest encroachment upon the extent of the way, although when thus encroached upon it may be amply sufficient for all purposes, would or would not be a breach of that injunction? The answer, no doubt, is, that the Court has adopted the language of the covenant; but if the language of the covenant be ambiguous and uncertain, it is a reason for not granting an injunction upon it, or, at all events, it does not supply a reason for introducing the indefinite and uncertain language of the covenant into an order of the Court, which the party enjoined disobeys, as I have said, at the peril of imprisonment.

If, therefore, the appellants will give the undertaking which I am about to read, I will dissolve that part of the injunction.

[His Lordship then, premising that in order to render the
 * 297 undertaking intelligible it must be recollected that * at the easternmost doorway the carriage-road was proposed to be continued for a clear space of eight feet, and that it was also to remain at that quarter of the clear width of twelve feet, read as follows: "And the appellants undertaking that the gateway or entrance to the carriage-way into Bell Court shall not be altered, either in width or level, and also undertaking not to interfere with or contract the carriage-way except at the distance of eight feet clear, measured eastward from the eastern end of the furthest or easternmost doorway in Bell Yard, at the end of which distance of eight feet clear the carriage-way is to end, but the width thereof from north to south from the western end of such last mentioned doorway up to such termination of the carriage-way is not to be less than twelve feet;" and proceeded thus:—]

Upon that undertaking I dissolve so much of the injunction as restrains the appellants from erecting the messuage in such manner as not to preserve the back entrance into the court and gateway, and the right of carriage-way in respect of the messuage.

There remains but one part of the decree under appeal to be considered, namely, that which gives liberty to the respondent to apply to the Court as he may be advised in the event of the appellants erecting any wall or building which shall prevent free access of light and air.

In my judgment such a liberty should not be given. If there be no reason for the interference of the Court, the application to the Court is premature. If reason arises hereafter it must be made the subject of another application or suit. That part of the decree I shall therefore discharge, but declare that the reversal is not to prejudice any further question.

* The rest of the decree, including that part which directs the appellants to pay the costs of the respondent, I affirm. * 298

FOXWELL v. BOSTOCK and Others.

1864. January 21, 22, 25, 26, 27, 28. February 10, 13, 17, 20. March 9. April 15, 18. Before the Lord Chancellor Lord WESTBURY.

The provisional and complete specifications of a patent ought not so to differ as that the nature of the invention as described in the one shall be materially different from the nature of the invention as described in the other. *Semble.*

A patent for a new machine may be good though the specification contains nothing but clear drawings of the machine and a description of them. *Semble.*

A patent for "the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle and shuttle," would be void from the unlimited extent of the words used, unless they could be cut down by the context so as to apply to a specified combination and arrangement of specified parts of machinery.

Where by the operation of a disclaimer a combination of machinery described in an amended specification is different from the combination of machinery described in the original specification, and for which the patent was granted: *Quære*, whether the patent is void or the disclaimer void.

Where the amount by which the disclaimer exceeds the statutory requirements as to its nature can be easily distinguished, the disclaimer is inoperative for such excess. *Semble.*¹

Where the combination of machinery in an amended specification was different from the combination in the original specification, and no specification remained of the invention for which the patent was granted; and where, the combination being claimed as the invention, it was only so far ascertained by the specification that the latter referred to certain drawings and their description, which did but describe an entire machine and the composition and working of its several constituent parts, without in any manner indicating where the

¹ See Kerr Inj. 425, 426; Seed v. Higgins, 8 El. & Bl. 755; Ralston v. Smith, 11 H. L. Cas. 223; Thomas v. Welch, L. R. 1 C. P. 192.

improvement lay or in what it consisted: *Held*, that the patent was void at law.²

In a patent for an improved arrangement or new combination of machinery, the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the whole machine: it must assign the *differentia* of the new combination.³

Observations on *Harmer v. Playne*, 11 East, 101; *Davies's Patent Cases*, 311.

THIS was the trial before the Lord Chancellor, without a jury, under the order made on the 7th of December, 1863, in the suits of *Foxwell v. Webster, &c.*, (a) of the issue as to the validity of the plaintiff's patent.

* 299 * The provisional specification filed by Charles Tiot Jenkins, the original patentee, stated, —

“ My improvements relate principally to the arrangement of the necessary machinery to give the required motion to the needle and shuttle in sewing or stitching any kind of material, and also in the means or method of supplying the needle and shuttle with the requisite silk, thread, or other material. The needle has a vertical motion, and the shuttle a horizontal one. The material to be sewed or stitched rests upon a plate or surface. The whole operation will be easily seen by reference to the accompanying sketch or outline drawings. But I wish it to be distinctly understood that I do not confine myself to the exact details shown thereon, as I consider this description merely an outline of my invention, which I will more clearly and fully explain in my complete specification.”

The patent, which was expressed to be for “ improvements in machinery or apparatus for sewing or stitching,” was dated in October, 1852, and sealed in the following January; and the following are the material parts of the complete specification, which was filed on the 15th of April, 1853, the words printed in italics being those which by the disclaimer after mentioned were struck out. The whole extract is referred to in the Lord Chancellor's judgment as “ the specified passage: ” — “ My invention

(a) *Supra*, pp. 77.—83.

² See *Penn v. Bibby*, L. R. 2 Ch. Ap. 127; *Kerr Inj.* 422, 423; *Mackelcan v. Rennie*, 13 C. B. N. S. 52; 1 *Joyce Inj.* 234.

³ See *Kay v. Marshall*, 8 Cl. & Fin. (Am. ed.) 245 and note (1); *Templeton v. Macfarlane*, 1 H. L. Cas. 595; *Kerr Inj.* 420, 421.

relates to an improved arrangement and combination of machinery for sewing or stitching by a needle and shuttle, *and of regulating the supply of the silk or thread to the needle and shuttle so as to keep it to a proper tension during the operation of sewing or stitching, with a means of enabling the mechanism to accommodate itself to different thicknesses of silk, thread, or material.* I work the shuttle by a driver, between the ends of which the shuttle lies, with a slight * play, so that when the driver acts on * 300 the back end of it to force it through the loop or bow formed by the vertical needle *passing the silk or thread through the material and then partially rising or returning*, there is sufficient space between the forward end of the driver and the shuttle for the passage of the thread, and at the end of this motion the shuttle remains nearly in a state of rest for an instant, whilst the driver receives a slight back movement to permit the passage of the thread between the back end of the shuttle and the driver. The shuttle remains nearly stationary whilst the needle is rising, and at the time the feed-motion is given to the cloth, *by means of which there are three pulls given simultaneously, — the upward pull of the needle on the needle thread, the feed motion of the cloth or material in one direction, and the strain in the other, so that the two threads are drawn together to draw the stitch tight.* The small spool or bobbin which supplies the shuttle with the silk or thread is placed in the shuttle, *and in the axle or tube thereof is a spring to control or regulate the supply of the silk or thread to the shuttle.* The thread to the vertical needle is regulated or controlled during the downward motion by means of a regulator turning on a pin or wire, which makes a slight pressure on the silk or thread as the needle descends, which pressure may be increased or diminished as circumstances may require by simply turning the lever thereof a little up or down. The silk or thread passes from the spool or bobbin, which is fixed on the frame of the machine in any convenient position, through the said regulator connected with the machine nearly opposite to the needle carrier, is guided to the bottom part of the vertical needle and passes through an eye about half an inch from its point, so that as the needle descends it passes through the cloth and then partially rises or returns, thus forming a loop or bow, then the shuttle carries the silk or thread through * the loop or bow, and then it is tightened *as already de-* * 301 *scribed*, thus forming a stitch. The nature of these improve-

ments will be better understood by the reference to the accompanying sheet of drawings. . . . *I do not confine myself to the exact details herein described, . . . but I claim as new and of my invention the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle and shuttle, the methods of regulating the supply of the thread or silk to the needle and shuttle, the arrangement of accommodating the machinery to the different thicknesses of the thread or silk, and the means of preventing the material from rising or the missing of the stitch when different thicknesses present themselves as herein described and illustrated.*"

The patent having in May, 1859, been assigned to the plaintiff, he in March, 1862, duly filed a disclaimer under the Statutes 5 & 6 Will. 4, c. 83, and 15 & 16 Vict. c. 83, thereby disclaiming so much of the specification as related to the means or methods of or mechanical arrangements for regulating the supply of thread or silk to the needle or shuttle; and also for accommodating the machinery to the different thicknesses of the thread or silk; and also for preventing the material from rising or the missing of the stitch when different thicknesses presented themselves; and also the separate working parts of the said machines separate and apart from the general arrangement and combination thereof; altering the specification by striking out the words thereof which are printed in italics above; and also by altering the passage thereof relating to the working of the shuttle by a driver, so that it should run, "I work the shuttle by a driver actuated by a bell crank and cam, between the ends of which said driver the shuttle lies," and so on.

* 302 * *Mr. Grove, Mr. Manisty, Mr. Locock Webb, and Mr. T. Aston* appeared for the plaintiff.

Mr. Bovill, Mr. Hindmarch, Mr. Webster, Mr. Talfourd Salter, and Mr. Ledgard for the defendants. — During the arguments an objection was taken by the defendants' counsel that the patent was bad because the provisional and complete specifications differed in their terms; and in support of this objection reference was made to The Patent Law Amendment Act (Statute 15 & 16 Vict. c. 83), §§ 6, 8, 9, and forms of letters-patent in the schedule thereto. *In*

re Newall and Elliot, (a) Crossley v. Beverley, (b) Curtis v. Platt, (c) Hancock v. Noyes, (d) Onions v. Cowley. (e)

The Lord Chancellor thought the objection removed by the disclaimer ; his Lordship thought, however, that, speaking generally, the provisional and complete specifications of a patent ought not so to differ as that the nature of the invention as described in the one should be materially different from the nature of the invention as described in the other.

March 9.

THE LORD CHANCELLOR. — The question has arisen in this case whether the original specification could be reduced by the disclaimer to the form of the amended specification without extending the patent right, — that is, without producing this result, that by the alterations the amended specification * was * 303 made to describe a different invention from that described in the original specification.

In the course of the argument I requested the plaintiff's counsel more than once to tell me where the invention was described. The answer was, that it appeared by the drawings and the description of the drawings. It was contended by the plaintiff's counsel, and, perhaps, justly, that a patent for a new machine would be good if the specification contained nothing but clear drawings of the machine and a description of them.

Adopting this argument and construction of the plaintiff's counsel, I will inquire what, upon the basis of that argument, must be the combination of machinery which is described and claimed by this amended specification.

And first taking what I will call "the specified passage" not to be a description of the invention, but only a description of the working or operation of part of the machinery, the same character applies to the passages which follow, down to the words "the nature of these improvements," and this accounts for these last mentioned passages not having been struck out of the amended specification ; they were inserted in the original specification as part of the description of the distinct inventions superadded to the

(a) 4 C. B. N. S. 269.

(b) 1 Webst. Pat. Ca. 106.

(c) Before the Vice- Chancellor WOOD : not reported.

(d) 9 Exch. 388.

(e) Macr. Pat. Ca. 256.

chief subject of the patent. These distinct inventions are now disclaimed, but those passages are still allowed to remain, and they become a description of the working or *modus operandi* of part of that machine, the drawings and description of which are afterwards given.

Taking the whole, therefore, of the amended specification, down to the words "the nature of these improvements," as a
* 304 description of the action of the improved * machine, we come to the drawings and the explanation of the drawings as the only description of the machine itself; and here we find the drawing and description of an entire needle and shuttle machine, including also those several additional mechanical arrangements which were stated in the original specification as the means by which the three separate inventions, for accommodating the supply of the thread to the needle and shuttle, and also for accommodating the machinery to the different thicknesses of the thread or silk, and also for preventing the material from rising, were to be effected.

As these last mentioned portions of the drawings have not been struck out in the amended specification, although the inventions themselves are disclaimed, but have been allowed to remain in the drawings and the description of the drawings, they must be taken as part of that combination of machinery for which the patent is claimed in the amended specification. Such is the necessary consequence of this portion of the description of the drawings having been allowed to remain; and this conclusion is confirmed by the language of the claim, which, as altered in the amended specification, is for "the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle and shuttle;" words which, by reason of their unlimited extent, would render the patent void unless they were construed as necessarily meaning the aforesaid combination and arrangement of the aforesaid various parts of machinery; and, if they are so construed, then they necessarily denote and comprise all the various parts of machinery which are therein before described and including the parts which belonged originally to the three separate disclaimed inventions.

* 305 This is the necessary result of the plaintiff's view of * the amended specification, and of the fact that the patent is for a combination of machinery, and that there is no other description

in the amended specification of that combination than what is afforded by the drawings and the description thereof; nor any thing which denotes that the patented combination is to consist of certain portions only of that machinery which is delineated and described. Unless we take the whole of the drawings and the description thereof as being the patented invention, there is nothing to show where the description of the invention begins and where it ends.

What, then, is the effect of this construction of the amended specification?

The patent was granted for "improvements in machinery or apparatus for sewing or stitching," and by the original specification they were described as consisting of "an improved arrangement and combination of machinery for sewing or stitching by a needle and shuttle;" and also, separately, of means for regulating the supply of the silk or thread, for accommodating the machinery to different thicknesses of thread or silk; and thirdly, for preventing the material rising or the missing of the stitch. Then those three last mentioned operations and the machinery for effecting them are treated in the original specification, and also by the disclaimer, as separate improvements, and as not forming parts of that combination of machinery which is the principal subject of the patent. That patent and the original specification and disclaimer all assume this as being the case; and treat these three separate arrangements as being something which may be exercised and eliminated without prejudice to the rest of the invention. But as the rest of the invention is the combination of machinery, those three parts could not have formed part of that combination; * for, if they had done so, they could not have disclaimed, * 306 unless, indeed, the patent and the original specification had treated them both as separate inventions, and also as to integral parts of the combination, which is not pretended by the plaintiff to have been the case; and if it had been pretended could not have been maintained.

The consequence, then, is this: that the combination of machinery now described in the amended specification is different from the combination of machinery described in the original specification, and for which the patent was granted.

The question then arises — is the patent void or is the dis-

claimer void? And to this question it is not easy to find an answer.

By the Statute 5 & 6 Will. 4, c. 83, which introduced disclaimers, it is in effect provided that the disclaimer to be entered must not be such as will "extend the exclusive right granted by the said letters-patent;" words which are vague and indefinite. Possibly they mean that the patent must not by the operation of the disclaimer be made to include or comprehend something which was not originally contained in the patent. The invention claimed may be reduced or diminished, but it must not be extended or enlarged.

What the consequence is to be if the disclaimer violates this provision is not stated. Some writers on the subject treat this proviso as amounting to a condition, and express an opinion that a disclaimer which does not comply with this condition cannot be filed under the statute, and is therefore void. I am not aware of any express decision on the subject.

* 307 * The statute provides further, that the disclaimer, when "filed by the clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters-patent or such specification in all Courts whatever." There is no express enactment in the statute that the disclaimer, if it transgresses the statutory limit by extending the exclusive right, shall be void to all intents and purposes; and unless it be so it must remain enrolled with and always accompany the letters-patent and specification. It might be proper to hold that the disclaimer is inoperative for the excess only, where that excess is clearly distinguishable; and this is the course which I have been anxious to take in the present case.

But I have found it impossible so to do. It is clear to my mind that the person by whom this disclaimer was prepared did not take that view of the original specification which is now admitted to be the correct one; namely, that the combination of machinery as patented and intended to be described in the original specification did not include the mechanical arrangements for effecting the three auxiliary inventions.

On the contrary, I think it appears that the framer of the disclaimer took the combination to include the whole of the machinery of which these mechanical arrangements were parts; and accordingly, whilst he disclaimed the auxiliary inventions in a

separate form, he was careful to retain the mechanical arrangements peculiar to these alleged inventions as part of the general combination and arrangement which were allowed to continue.

The disclaimer proceeds on a recital that the three auxiliary processes may not have been new and useful at the date of the letters-patent; and further, that it was not expedient to make any claim, direct or implied, to * these mechanical * 308 arrangements, nor to the working parts of the machine separate and apart from the general combination and arrangements expressly mentioned in the said specification.

Then the disclaimer in its operative part disclaims so much of the said specification as relates to the means or methods of or mechanical arrangements for regulating the supply of thread or silk to the needle and shuttle; and also for accommodating the machinery to the different thicknesses of the thread or silk; and also for preventing the material from rising or the missing of the stitch when different thicknesses present themselves; and also the separate working parts of the said machine (in the plural), separate and apart from the general combination and arrangement thereof.

And the disclaimer then proceeds to alter the original specification by omitting the parts struck out and by making several insertions; and it is most important to observe, that although every passage which contains any thing like a claim to the three separate auxiliary inventions is struck out, yet the mechanical arrangements are preserved in the drawings and in the description of the drawings; and (which is very material) corrections and additions are made by the disclaimer in the description of these mechanical arrangements thus preserved and continued as part of the amended specification.

It is, therefore, in my judgment, clear that the mechanical arrangements for effecting the auxiliary inventions are left intentionally in their corrected and amended form as integral parts of that combination of machinery to which the patent by the operation of the disclaimer is intended to be confined.

* The result is, not only that the combination in the * 309 amended specification is different from the combination in the original specification, but also that there is no specification remaining of that invention for which the patent was granted.

But there is another and more material objection to the sufficiency of the specification.

The patent is for "improvements in machinery or apparatus for sewing or stitching," and the specification describes the invention as consisting in "an improved arrangement and combination of machinery for sewing or stitching by a needle and shuttle." The words "improved arrangement" or "improved combination" indicate the nature of the invention. But it is the duty of the patentee particularly to describe and ascertain his improvements in his specification; for it is the improvement which is the invention. The plaintiff's counsel contend that this is done by the drawings and the description of the drawings; but the drawings and the description thereof exhibit and describe an entire machine, and the composition and working of its several constituent parts, without in any manner indicating where the improvement lies or in what it consists. The answer given to the objection is, that the improvement—that is, the invention—lies in the whole combination or arrangement, which is the novelty. It must follow, that an accurate knowledge of the construction of all needle and shuttle machines, which were known and used in England at the date of this patent, is necessary in order to discover the differences and novelties that existed in this improved combination; and as those differences are numerous, it would not even then be possible to tell in which of those differences the improvements of the plaintiff's patent consists. The law requires that the

* 310 * specification should be intelligible to a workman of ordinary skill and information on the subject. A new combination or improved arrangement of machinery, therefore, should be so described as that a person of ordinary knowledge on the subject may be able at once on reading the specification to perceive the invention and the manner in which it is to be performed. It is not sufficient to say, that a person possessed of all the knowledge existing at the time of the patent on the subject of sewing machines will discern the improvement. That is more than the law requires.

The difficulty of the plaintiff arises entirely from the character which he has thought fit to give to his alleged invention, and the manner in which he has described it. His counsel had no difficulty in describing at the bar the improvement. They stated it to

consist of an arrangement of three cams on one shaft, by the direct action of which the three principal motions in a needle and shuttle machine, namely, the needle movement, the shuttle movement, and the feed movement are effected; and the plaintiff's evidence was directed to show that this arrangement formed the novelty and utility of the patent. But this clear and simple statement is not to be found anywhere in the specification.

It is true that the cams and the shafts are described indiscriminately with the rest of the machine in the specification, but there is nothing to indicate that it is this addition which constitutes the improved arrangement or the new combination. The argument is, that this is not necessary where the patent is for a combination. But I think that both on principle and authority, it is most necessary that the specification should ascertain the improvement when the patent is for an improved — that is, for a new — combination. At the date of this patent * many combina- * 311
tions of machinery, or, in other words, many machines for sewing or stitching by a needle and shuttle, were known and used. If in that state of things a patent is taken out for an improved arrangement or combination, the patentee is bound to show in what the improvement consists and how it is to be effected. And this obligation is not discharged by a description of the entire machine which embodies the improvement, but which description does not distinguish the improvement, and thereby renders it undiscoverable, except upon a minute comparison and collation of all existing combinations with the new combination that is claimed. A specification so framed has the effect of concealing rather than disclosing the invention. The condition of the patent is, that the specification shall particularly describe and ascertain the nature of the invention, and in what manner the same is to be performed. If a combination of machinery for effecting certain results has previously existed and is well known, and an improvement is afterwards discovered, consisting, for example, of the introduction of some new parts or an altered arrangement in some particulars of the existing constituent parts of the machine, an improved arrangement or improved combination may be patented; but it would be contrary to the spirit of the patent law and of the decided cases to permit a patent to be taken out for a new combination, and the whole machine to be described and specified as a new invention, without in any manner distinguishing or marking.

the improvement by the introduction or addition of which the improved arrangement or the improved combination is in reality produced. The term "combination of machinery," which has of late been a favourite form of words with patentees, is nothing but an extended expression of the word "machine." It is the word

"machine" writ large; and as a patent for an improved
 * 312 machine, in the specification * of which the improvement was not particularly stated and described, would hardly be attempted to be supported, so neither in my judgment can the patent for an improved arrangement or combination be supported, in the specification of which there is nothing to distinguish the new from the old.

It is true, that a person perfectly well acquainted with the subject, and having present to his mind all pre-existing combinations, would be able to discover that which constitutes the novelty. But this is not the condition on which the patent is granted. It was said by Lord ELLENBOROUGH in *Harmar v. Playne*, (a) a case cited by the plaintiff, that the object of requiring a specification to be enrolled seemed to be, to enable persons of reasonable intelligence and skill in the subject-matter to tell from the inspection of the specification itself what the invention was for which the patent was granted. But this cannot be done on the inspection of the specification of this patent.

It is true that the case of *Harmar v. Playne* was held to be an exception to this rule, but *exceptio probat regulam*. In that case a patent was taken out for a machine: the inventor afterwards discovered an improvement, and he took out a second patent for an improved machine, and in the specification of that second patent he described the whole machine, without distinguishing the improvement, and the objection was that the specification was insufficient and the patent bad; but inasmuch as in the second patent he had recited the first patent and the specification under it, it was held, that that recital being in immediate comparison with the

new specification, furnished in *gremio* of the new patent the
 * 313 means of distinguishing the new from the old. It was * contended by the plaintiff's counsel that a specification ought to be read by the light of the knowledge existing at the time. If, for example, some law of nature or some fact in science be discov-

(a) 11 East, 101, 106; Davies's Pat. Ca. 311.

ered and made publicly known, the specification of a patent subsequently granted may assume that such natural law or scientific fact is known to the reader, and it need not be stated or explained. Thus, to put a familiar instance, if after the law of gravitation had been discovered and made known a specification had stated or assumed certain results as being the consequences of that law, but without mentioning or referring to that cause, such specification would not have been insufficient or obscure. So the specification of a patent for a chemical discovery may be so worded as to assume a knowledge of the existing and known state of the science, provided it gives a clear description of the alleged new discovery, that is, of the addition which it professes to make to the existing knowledge. In such cases it will still be the fact that the invention will appear from the specification. But such cases are very different from the present, where the invention cannot be ascertained otherwise than by the exhaustive process of comparing and collating all existing machines and similar patents with the description of the new combination; and as such comparison would disclose many differences, the public would still be at a loss to know whether all or which of those differences constituted the merit of the new combination.

I must, therefore, lay down the rule which is consistent with and in reality a mere sequence from the decided cases, that in a patent for an improved arrangement, or new combination of machinery, the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general *description of the entire machine: * 314 it must, to use a logical phrase, assign the *differentia* of the new combination.

This obligation flows directly from the condition of the patent; it is part of the condition of the patent that the specification shall particularly describe and ascertain the invention. With that condition this specification, in my judgment, fails to comply.

Anxious as I have been to find, if possible, a construction of the amended specification which would uphold the validity of this patent, it must yet be remembered that, the amended specification being part of the disclaimer, portions of it which it might be proposed to reject as being in effect disclaimed cannot be cut out of that specification. They must still remain part of it for the purposes of construction, and accordingly the combination and

arrangement of the various parts of machinery mentioned in the claim must extend to the whole of the machinery contained in the drawings and in the description of the drawings; and as the claim is confined to the combination and arrangement of machinery before described, that portion of the specification which I have called "the specified passage" cannot be taken to be the description of the invention.

If the disclaimer were treated as valid, and the case were remitted to the original specification, I should be of opinion, for the same reasons, that that also was insufficient.

I must, therefore, declare that the specification of this patent is insufficient, and that the patent is void at law.

In arriving at this conclusion, it has not been without
* 315 * attention to the consideration that a specification should be construed with a willing mind and a desire to understand. (a) I have abstained from adverting to any thing given in evidence by the defendants, taking materials I have used wholly from the opening of the plaintiff's case and the evidence adduced on his behalf.

April 15.

Mr. Hindmarch having on this day, on behalf of the defendants, applied to the Court that the bills might be dismissed as against them, and the Lord Chancellor having desired that all the causes bound by the order of the 7th of December, 1863, should be placed in the paper together,

April 18.

His Lordship on this day made an order staying the proceedings in all such causes, and directing the plaintiff to pay the costs up to that time, including the costs of the present order, and reserving liberty to the defendants in the other causes who had not applied to have the benefit of the order of the 7th December, 1863, to move to dismiss the respective bill against them for want of prosecution.

(a) See *Hullett v. Hague*, 2 B. & Ad. 370, 377: *Russell v. Cowley*, 1 C., M. & R. 864; *Beard v. Egerton*, 8 C. B. 165.

* BUNN. v. BUNN.

* 316

1864. March 10. Before the LORDS JUSTICES.

The penalty and forfeiture clauses of the Statutes 13 Eliz. c. 5, and 27 Eliz. c. 4, cannot be used by defendants in equity who are parties to deeds which it is sought to impeach under those statutes, as exempting them from giving discovery, or from the necessity of making the common affidavit as to documents, even though among such documents may be the deeds sought to be impeached.¹

THIS was an appeal by defendants from an order made by his Honor the Vice-Chancellor STUART in the usual form, requiring them to make the common affidavit as to documents. The suit was that of a creditor for the administration of the testator's estate and to set aside a voluntary settlement made by him, of which the appellants were trustees.

Mr. Malins and *Mr. Swanston*, for the appellants. — We object to make the affidavit required of us, because it involves an admission of the possession and existence of the deed which this suit seeks to impeach. If that deed be successfully impeached, we shall, as parties to it, be exposed to penalties and forfeitures under the Statute 13 Eliz. c. 5, § 3. We, as defendants, need not say how any answer of ours may tend to criminate us; it is our privilege to decline to answer any question which in our judgment may have that tendency. In point of fact, the hostility of the parties in the present case is such that an indictment against us under the statute will follow, if the plaintiff succeeds in setting aside the deed.

[THE LORD JUSTICE TURNER. — If you give up the deed, you are not exposed to any penalties under the statute.]

No; but we are beneficially interested under the deed, and therefore decline to give it up.

[THE LORD JUSTICE TURNER. — If you defend the deed honestly

¹ See *Burns v. Hobbs*, 29 Maine, 273; *Bay State Iron Co. v. Goodall*, 39 N. H. 223; *Howell v. Ashmore*, 1 Stockt. (N. J.) 82; *Michael v. Gay*, 1 F. & F. 409.

and justly, you are exposed to no penalty. It is only if you defend it dishonestly or unjustly, that you are exposed to any penalty.]

Be it so. Still we object to answer any question which may forge a link in the chain with which our opponent seeks to bind us.

* 317 * They referred to *Wich v. Parker*, (a) *Short v. Mercier*, (b) *Fisher v. Ronalds*, (c) *Osborn v. The London Dock Company*, (d) *Reg. v. Smith*, (e) and as *in pari materia* to Stat. 27 Eliz. c. 4, § 3.

Mr. Bacon and *Mr. Hardy*, for the respondent, were not called upon, but with reference to the case of *Fisher v. Ronalds*, (c) referred to *Re The Mexican and South American Company, In re Aston*. (g)

THE LORD JUSTICE KNIGHT BRUCE. — I am clearly of opinion that it is not the rule or practice of this Court to allow the provisions of either of the Statutes of Elizabeth to which reference has been made to be used to prevent discovery. The affidavit must be made. If any objection is made to produce any particular document, that objection must be considered hereafter on its own merits.

THE LORD JUSTICE TURNER. — I am quite content to stand on the authority of those who have preceded me for the last two hundred years. I never heard of this question being raised before. I think that this appeal should never have been brought; but that, being brought, it must now be dismissed with costs.

Their Lordships then directed the affidavit to be made within ten days from that date.

(a) 22 Beav. 59.

(b) 2 De G. & Sm. 635; 3 Mac. & G. 205.

(c) 12 C. B. 762, 765, *per* MAULE, J.

(d) 10 Exch. 698, 701, *per* ALDERSON, B.

(e) 6 Cox, Crim. Cas. 31.

(g) 27 Beav. 474.

* TRAILL v. BARING.

* 318

1864. March 14, 15. Before the LORDS JUSTICES.

A life assurance society reassured a portion of its risk on one of its policies with a second society, stating that a third society had reassured part of the risk, and that the remainder beyond what it was proposed that the second society should take would be retained by itself, the first society. This was the intention of the first society at the time, but in the interval between the proposal to the second society and the completion of the reinsurance with it, the first society, for reasons connected with its own business, but without the intervention of any new fact, or new information, or change of opinion as to the value of the life ultimately assured, changed its prior intention and reassured the whole of the risk beyond what was to be taken by the second society with the third society. The first society, however, did not communicate its change of intention to the second society, but allowed them to complete their reinsurance. The life having dropped, and the risk having become a claim, and the second society having learnt the above facts, and having declined to pay the amount of their own reinsurance, the first society brought an action at law against them on the policy. Upon a bill filed by the second society against the first, alleging, as by evidence was proved to be the fact, that the retention by the first society of a portion of the risk was a material element in inducing the second society to take a share in it without further investigation than they actually made, and praying to have it declared that the policy had been "fraudulently" obtained, and ought to be delivered up to be cancelled, and seeking an injunction to restrain the action and any other proceedings: *Held*, —

1. That the second society was entitled to the relief it sought.
2. That the case made by the bill was one for equitable relief, and that there was consequently jurisdiction in equity to deal with it, even if it might have been dealt with at law also.
3. That the word "fraudulently" in the prayer of the bill was properly used in its technical sense, and that consequently failure of proof of fraud in fact was immaterial.
4. That even although where a bill alleges a case of fraud only, and the fraud is not proved, the bill will be dismissed; yet if the case alleged is not one of fraud only, relief may be given on the alternative case made by the bill. Observations on *Wilde v. Gibson* (1 H. L. Cas. 605) on this head.

Per the Lord Justice TURNER. — If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the repre-

sentation to communicate to the party to whom the representation has been made the alteration of those circumstances: and the Court will not hold the party to whom the representation has been made bound unless such communication has been made.¹

THIS was an appeal by the defendants from a decree of the Vice-Chancellor Sir JOHN STUART, whereby his Honor directed a
 * 319 certain policy of reinsurance for * 1000*l.*, granted by the Reliance Mutual Life Assurance Society to the Provident Clerk's Mutual Life Assurance Association on the life of one Mrs. Lydia Taylor, to be delivered up to be cancelled with ancillary relief, and ordered the appellants to pay the costs of the suit.

The case in the Court below is reported in the 4th volume of Mr. Giffard's Reports. (*a*)

The facts were as follows: —

In 1838 the International Life Assurance Society assured the life of Lydia Taylor for a very large sum of money.

In May, 1861, they, in accordance with a common practice of the London assurances offices, reassured her life with the Provident Clerk's Mutual Life Assurance Association, herein after called the association, for 3000*l.*, so as thereby to diminish their own risk. The risk of the association to the International Life Assurance Society commenced on the 9th of May, 1861.

On the 10th of May, 1861, Mr. Linford, the secretary of the association, called on the secretary of the Reliance Mutual Life Assurance Society, herein after called the society, at the office of the society, and proposed, on behalf of the association, that the society should take part of their risk in Lydia Taylor's life by way of reinsurance, alleging that another office, the Victoria office, had agreed to undertake that risk to the extent of 1000*l.* or more, but that the association would themselves retain 1000*l.* of it; and proposing that the society should take the remaining 1000*l.*

* 320 He further stated * that Lydia Taylor was alleged to be in her sixty-second year; that no fresh medical examination could be had, but that from information which he had obtained the directors of the association were satisfied that the life was a first-class life, and that they had accepted the proposal and granted the assurance for 3000*l.* upon that footing.

This verbal proposal of the secretary of the association was

(*a*) Page 485.

¹ See Kerr Fr. & M. (1st Am. ed.) 67.

entertained and accepted on the same 10th of May, 1861, by the secretary of the society in these words: "This office will join you in the risk on the life of Mrs. Lydia Taylor to the extent of 1000*l*."

This acceptance was confirmed on the 14th of May, and notice given to the association on the following day.

It was alleged that it was in reliance on the representations made by the secretary of the association that the association had confidence in the goodness of the life, and that they would retain 1000*l*. as their proportion of the risk under the assurance for 3000*l*. which they had granted on her life, that the proposal was accepted as a partnership risk by the society, who dispensed with the usual investigation or inquiry into the age, health, or habits of Lydia Taylor.

On the 18th of May, 1861, the society issued the policy in question in the suit as of that date to the association, and the association paid to the society the sum of 79*l*. 13*s*. 4*d*. for the first year's premium on the reinsurance. This sum was merely the amount of one-third of the premium charged by the association to the International Life Assurance Society for that society's 3000*l*. policy, and was not the sum which under ordinary circumstances would have been the society's premium on a 1000*l*. assurance of a first-class life of * sixty-two. The risk on this * 321 policy commenced on the 18th of May, 1861.

On the 30th of January, 1862, Lydia Taylor died suddenly. Notice of her death was not given to the society by the association until the 21st of May following.

After her death the society discovered that the association, instead of retaining the 1000*l*. risk on her life which they had represented to the society they would retain, and in contravention of that representation, had on the 15th of May, 1861, assured by way of reinsurance with the Victoria office the further sum of 1000*l*. in addition to the 1000*l*. in which they had already reassured in that office; thus by reinsurance getting rid of the whole of their liability in respect of the policy granted by them to the International office. No notice of this fact was given by the association to the society prior to the 18th of May, 1861.

The reason alleged by the defendants for this departure from the earlier representations of the secretary of the association was, that at a meeting of directors held on the 15th of May, 1861,

remark was made upon the large amount of reinsurance business transacted with the International Life Assurance Society during the week, and it was resolved to retain no part of the risk of the present reinsurance, the case happening, as was remarked by a director present, to be the only one then before the meeting where no fresh medical evidence could be obtained, and the Victoria being willing to take 2000*l.* of the risk instead of 1000*l.* It was

also alleged that the resolution was in no sense dependent on
 * 322 any want of confidence in the goodness of Lydia * Taylor's life existing on the part of either the individual director or the meeting.

After a correspondence between the secretaries and solicitors of the society and the association ensuing upon the announcement by the latter to the former of Lydia Taylor's death, the society finally refused to pay the 1000*l.* assured with them by the association; and the association consequently, in October, 1862, commenced an action on the policy against the plaintiffs in this suit.

The society was an unincorporated association, and the plaintiffs in this suit were those three of its directors who had signed the policy in question. The defendants in the suit were the trustees and secretary of the association, — a body registered by the registrar of friendly societies.

The bill was filed in November, 1862, stating the facts of the case, alleging in effect that it was the custom and understanding with London assurance offices upon such reassurances as the present (in the absence of a special stipulation or statement to the contrary) that the office effecting the reinsurance should itself retain a substantial portion of the risk covered by the original assurance, and for the office with which the reinsurance was effected to dispense with the usual medical examination on their own behalf of the person whose life was assured, and with the usual inquiries as to his or her health and habits, and to rely on the retention by the office granting the original assurance of their fair portion of the risk as a guarantee of their good faith in reinsurance; and alleging further, that the society would not have effected the reinsurance if it had not been that the association were to

retain 1000*l.* of the 3000*l.* risk themselves; and praying
 * 323 a declaration that the 1000*l.* policy of assurance * of the 18th of May, 1861, was fraudulently obtained and ought to

be set aside and delivered up to be cancelled ; and for an injunction to restrain the action and any other proceedings.

It appeared that the Victoria office had reassured the whole of the 2000*l.* with knowledge that the association was retaining no part of the risk, and had paid the full 2000*l.* so assured by them.

The general effect of the evidence in other respects sufficiently appear from the judgments of the Lords Justices and from *Mr. Giffard's* report of the case in the Court below.

Mr. Bacon and *Mr. Dauney*, for the respondents, the plaintiffs in the suit, relied upon *Reynell v. Sprye*. (a)

Mr. Malins and *Mr. E. K. Karslake*, for the appellants. — The bill is wholly founded on fraud. No fraud has been made out or is even suggested at the bar. The bill, therefore, is unsustainable. *Wilde v. Gibson*. (b)

[THE LORD JUSTICE TURNER. — The doctrine to which you refer merely amounts to this, that if a bill be founded upon fraud the allegations of fraud must be proved ; but there is no doubt that if the bill makes an alternative case, if it does not rest upon fraud alone, the failure to prove the allegations of fraud alone is not enough to dismiss the bill.]

The facts of the case show that equitable fraud is out of the question : *Jeremy's Equity Jurisdiction*. (c) The association did *bonâ fide*, on the 10th of May, 1861, intend to retain to themselves *1000*l.* of their risk on the 3000*l.* policy. The * 324 representation made by their secretary to the secretary of the society to that effect was therefore true. It is true, that on the 15th of May the association changed its prior intention. But it did not do so by reason of any newly acquired information, or the existence of any new fact or any change of opinion with reference to the goodness of the assured life. Nor had they any such newly acquired information, nor had any new fact any existence, nor was there any change of opinion as to the goodness of the life, on the 18th, on which day the policy in question in this suit was signed on behalf of the society. There was, therefore, noth-

(a) 1 De G., M. & G. 660.

(c) Pages 385 *et seq.*, ed. 1828.

(b) 1 H. L. Cas. 605.

ing for them to communicate to the society. The law of this Court as to the binding nature of representations upon the person making them has been discussed at large in *Hammersley v. De Biel*, (a) *Jorden v. Money*, (b) *Piggott v. Stratton*, (c) *Loffus v. Maw*, (d) *Hutton v. Rossiter*. (e) But that question does not arise here. The present plaintiffs are not seeking to make the association make good their representation. In point of fact, the representation has been made good by the Victoria office. And if the plaintiffs' case rested upon the facts of the case, those facts would have equally afforded them a defence at law. The same would have been the effect of their case resting — which, however, we deny that it does — upon implied contract. Their defence would equally have been at law, and there was no necessity for them to come into equity to have the policy delivered up to be cancelled.

[The Lord Justice KNIGHT BRUCE referred to *Threlfall v. Lunt*. (g)]

That case is referred to in Story's Equity Jurisdiction, (h) * 325 and we adopt the statements there made * as part of our argument. It cannot be seriously pretended that the retention by the association of a portion of their liability on the 3000*l.* policy acted as a material inducement to the society to take 1000*l.* of the risk. For the evidence of Mr. Ratray, the secretary of the Victoria office, shows that he thought so little of the change of intention on the part of the association, of which he was fully cognizant when that office took the second 1000*l.* risk from the association, that he made no scruples in so doing.

They also referred, on the frame of the bill, to *Burdett v. Hay*. (i)

A reply was not heard.

THE LORD JUSTICE KNIGHT BRUCE. — It is in my judgment a just inference from the evidence in this cause that the society

(a) 12 Cl. & Fin. 45.

(b) 5 H. L. Cas. 185.

(c) 1 De G., F. & J. 33.

(d) 3 Giff. 592.

(e) 7 De G., M. & G. 9.

(g) 7 Sim. 627.

(h) Vol. 2, p. 11, §§ 700 a, 701, 2d ed.

(i) *Supra*, p. 41.

represented by the plaintiffs was induced to agree to grant, did agree to grant, and did grant the reassurance policy in question, dated the 18th of May, 1861, on the faith and in consequence of a representation made to them on the part of the assured, the society represented by the defendants, that the defendants' society would retain and remain subject, to the extent of 1000*l.*, to the liability upon the assurance for 3000*l.*, as to 1000*l.*, other part of which, the assurance in question was granted.

It may be that until the 15th of May, 1861, the society represented by the defendants continued to intend to abide by that representation, but on the 15th of * May, 1861, that * 326 intention was changed. The notion of retaining any portion of the liability to the 3000*l.* was abandoned and a different course was adopted.

If that change of intention, if that abandonment, if that different course, if that intention of not retaining any portion of the risk, had been communicated to the society represented by the plaintiffs, as it ought to have been, without delay, all might have been well. But no such thing was done, and three days after this uncommunicated change of intention the assurance was allowed to be completed. That assurance should not have been allowed to be completed, without a full and clear communication that the intention represented to exist of retaining the liability under the 3000*l.* policy to the extent of 1000*l.* had been abandoned.

In my judgment the misrepresentation was material. The representation is proved to have been an inducement, an important inducement, to the plaintiffs' society to accept the assurance, in the circumstances in which it was accepted, without more inquiry and more investigation than was then made. It appears to me, I repeat, that the plaintiffs are entitled to assert, and to be believed in asserting, that they would not have acted as they have done if they had known, as they ought to have been informed by the society represented by the defendants, of the real facts.

Accordingly, in my judgment the decree is right. The contract was obtained by means of an untrue representation, — a representation positively intended to be carried into effect at the time, but abandoned afterwards, and the abandonment not communicated. The decree, * therefore, as I say, is, in my judgment, * 327 plainly right, subject only to two remarks.

One applies only as to costs: I have felt some doubts whether the evidence on the part of the plaintiffs has not been more copious and profuse than it should have been.

The other remark is a very trifling one, considering the amount of premium directed to be paid; viz., whether the interest on the premium should have been at the rate of 5*l.* per cent or 4*l.* per cent. It involves so small an amount that it probably is hardly worth considering or mentioning.

Objection has been taken to any decree being made in this suit on the ground that the word "fraudulently" had been used in the prayer of the bill, while there has been no proof of fraud.

In my judgment the circumstance forms no objection at all. In one proper sense, the technical sense, the word "fraudulently" is properly used where it is here used, and its use does not in the slightest degree prejudicially affect the plaintiffs' case.

It has been said, also, that the objection taken by the plaintiffs to the policy is a mere legal objection, and that this dispute, if not proper exclusively for a Court of Law, is at least as proper for a Court of Law as for this jurisdiction.

My judgment is otherwise. That argument is against the established course of the Court for — I had well nigh said — centuries.

Whether the jurisdiction in such a case as this is exclusively

* 328 here I give no opinion; but * assuming the jurisdiction to be not exclusively here, it is in my judgment at least as proper here as in a Court of Law.

Subject only to the very small matters which I have mentioned, the decree is, in my judgment, manifestly right.

THE LORD JUSTICE TURNER. — I agree.

In disposing of the case, I desire, in the first place, to absolve the defendants from all imputation of any intention of actual fraud; actual fraud has not been imputed at the bar, and the circumstances of the case in my judgment entirely exclude that consideration.

But that by no means disposes of the case; for there are many states of circumstances in which there is technical fraud, in which transactions are fraudulent in the eyes of this Court, or characterized by the designation of fraud, although there may be no actual moral fraud. The question really here is, whether this case does

or does not fall within the range of those cases in which this Court holds a transaction to be fraudulent, although it may not be morally so.

The case has been dealt with by the defendants as if it were one of implied contract.

I give no opinion whether or not that view of the case would be right if the question depended wholly on the custom of assurance offices. But the case does not in my view of it in any way depend upon that question. It depends, in my judgment, entirely upon the representations * which were made and which * 329 induced the plaintiffs to accept the burden of the reinsurance in question.

The question really is, whether, representations having been made that a liability would be retained on the part of the defendants, and that intention having been changed before the liability attached upon the plaintiffs,—for there is no evidence in support of the contention at the bar to the contrary,—there ought not to have been a communication of that change of intention to the plaintiffs before they undertook the liability for the 1000*l.* in question.

I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made.

Thus, suppose a man agrees to execute a deed releasing his debtor upon certain terms on the assurance that another person, also a creditor of the debtor, has agreed to do the same, and the other creditor has in fact agreed to do so at the time, but has afterwards withdrawn from the agreement, and the withdrawal is not communicated to the person who has agreed to give the release upon the * faith of another creditor having agreed * 330

to do the same, although it is known to the person upon the faith of whose assurance he agreed to give the release; and he executes the deed. This Court would not hold him bound by the deed he had executed. *Underhill v. Horwood* (a) is a case in point on such a state of circumstances; but, independently of cases, I adhere entirely and literally to the opinion expressed by Lord CRANWORTH in the case of *Reynell v. Sprye*, (b) and I think that that opinion is perfectly decisive upon a question of this description.

It is said here that the change of circumstances was not such as could in any way have changed the course of the plaintiffs' conduct, and the evidence of witnesses has been relied upon in support of that view. But the real question is not what the witnesses thought,—not whether Mr. Ratray thought that those were circumstances which were so material as that they might change the intention of the plaintiffs,—but what the plaintiffs themselves would have thought if the change of intention on the part of the defendants had been communicated to them, the plaintiffs. The argument, therefore, is entirely beside the question. Had this representation of what had occurred and of the change of intention on the part of the defendants been communicated to the plaintiffs, it is impossible to say what course the plaintiffs would have pursued,—whether they would or would not have accepted the policy. They might have done so: but it is equally clear that they might not; and we cannot say whether they would or would not: but it was to them that the communication should have been made, in order that they might exercise their option upon the subject.¹

* 331 * Some observations have been made upon the case of *Wilde v. Gibson*, (c) and other cases of that description.

The bearing of those cases was explained in the case of *Archbold v. The Commissioners of Charitable Bequests for Ireland*. (d) But I do not think that those cases have any bearing whatever upon the question in this suit. No doubt if a bill alleges a case of fraud, and the plaintiff rests his case upon that case of fraud only, and fails in proving the case of fraud, the bill must be dismissed;

(a) 10 Ves. 225.

(c) 1 H. L. Cas. 605.

(b) 1 De G., M. & G. 660.

(d) 2 H. L. Cas. 440. See also *Hickson v. Lombard*, L. R. 1 H. L. Cas. 324.

¹ See *Smith v. Kay*, 7 H. L. Cas. 750, 770; *Reynell v. Sprye*, 1 De G., M. & G. 660; *Kerr F. & M.* (1st Am. ed.) 75.

but if the plaintiff puts a case not resting entirely upon the proof of fraud and proves the case which he has so alleged, he is entitled to relief.

Questions have also been raised upon the jurisdiction of this Court in such a case as this.

But those questions in my judgment do but run into the original question of whether there is an equitable case stated by the bill. If there be, there is a jurisdiction in this Court to interfere by way of injunction if necessary, and also by way of ordering the instrument to be delivered up to be cancelled.

In my judgment a case of equitable jurisdiction is well proved in this case ; the decree is right, and this appeal must be dismissed.

Neither party considering it worth while to argue the second of the two points referred to by the Lord Justice

* KNIGHT BRUCE in his judgment, — viz., that as to the rate * 332 of interest to be paid on the premium,—his Lordship again referred to the point which he had previously mentioned ; viz., the profusion of evidence in support of the plaintiff's case.

The Lord Justice TURNER, however, intimated that in his judgment the amount of the evidence in question was not excessive.

No alteration was made in the decree.

TURNEY v. BAYLEY.

1864. March 17. Before the LORDS JUSTICES.

A person who had acted as the foreman of a manufacturer's business filed his bill against the manufacturer, alleging that under an agreement between them the plaintiff was to have a weekly salary of 30s., and in addition one-sixth of the profits of the business, and praying an account and payment of one-sixth of the profits of the business to him accordingly. The defendant by his answer denied the truth of the plaintiff's case, but admitted a right on his part, under a different agreement, however, to that set up by him, to a weekly salary of 30s. (originally) and to one-twelfth of the profits of the business, coupled, however, with an agreement on the part of the plaintiff that the latter should take the statements of the defendant as to the profits to be true, and

should not demand or question the business transactions or be entitled to examine or investigate the business books.

The defendant made the usual affidavit as to documents, in which he admitted the possession of documents relating to the matters in the cause, but declined to produce them for the reasons appearing on his answer. *Held*, that he was not compellable to produce them upon an interlocutory application before the hearing, their production not being relevant to the issue whether or not the plaintiff was entitled to a decree for an account, although their production might be material on the question of the amount payable to him if the account were directed.¹

THIS was an appeal by the defendant in the suit, from an order made by his Honor the Master of the Rolls on an adjourned summons taken out by the plaintiff, the present respondent.

* 333 * The object of the summons in question was the enforcement of the production by the appellant of certain documents which he in the common affidavit as to documents made by him admitted to have reference to the matters in question in the suit, but which he objected to produce for the reasons appearing upon his answer.

The Master of the Rolls, however, thought the documents ought to be produced, and so ordered; and his Honor also ordered the appellant to pay the costs of the summons. The present appeal was from this order.

The case made by the original bill was shortly as follows: —

For several years previous to 1854 the respondent was in the service of the appellant and his partner John Shaw (who were fellmongers and leather-dressers at Lenton, in Nottinghamshire) as their foreman in one particular branch of their business, and at a weekly salary of 2*l*. The partners were entitled to the profits of the business in equal shares.

In January, 1854, a proposal was made by the appellant on behalf of his firm to and was accepted by the respondent that the respondent's weekly wages should be thenceforth 30*s*. only, but that as an inducement to him to use greater exertions in the business he should be entitled to receive in addition to such reduced weekly salary a sum equal to one-sixth of the appellant's share of the profits of the business.

In 1856 Mr. Shaw retired, and the defendant thenceforth carried on the business on his own account, the respondent remain-

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1829, 1830.

ing with him at a weekly salary of 30s. * and a sum equal * 334 to one-sixth of the profits of the business, and stock was taken from time to time down to and in the month of May, 1860, by the appellant, for the purpose of ascertaining the amount of such profits, and on each occasion an I O U was given to the respondent by the appellant for the sum which the latter stated was due to the respondent under and according to the agreement in respect of such profits, after deducting certain sums received by the respondent out of the business on account.

The respondent quitted the appellant's service on the 2d of January, 1863; and in February of the same year an account was stated between the two of what was due to the respondent in respect of the I O Us above mentioned, and the balance was paid to him by the appellant; but what was due to the appellant under the agreement in respect of the one-sixth share of the profits of the business since the stock-taking in May, 1860, was left unpaid and unascertained, the appellant promising to furnish an account of the amount within a limited time.

The time named having elapsed without any account having been rendered, a correspondence ensued between the respective solicitors of the parties, which ended in an interview between the parties and their solicitors on the 7th of May, 1863. At this interview the appellant proposed that the respondent should state his willingness to accept whatever sum the appellant should say was the balance due, and not ask either for an account or an inspection of the books, and said that on the respondent's doing so, he, the appellant, would be prepared to state the sum he found to be due to the respondent, and give his check for the amount; and the appellant intimated that if the respondent refused this *offer, he might take his own course. The offer was * 335 declined.

In this state of things, and after a further correspondence between the solicitors of the parties, in the course of which the solicitors of the respondent wrote to the solicitor of the appellant as follows: "Will your client furnish us with a statement of the result of his stock-taking, and give our client such an inspection of his books as will enable him to test its accuracy?" the original bill was filed on the 12th of August, 1863, seeking (1), an account of the profits of the business from the 13th of May, 1860, to the 2d of January, 1863, when the respondent quitted the

appellant's service ; (2), payment by the appellant to the respondent of a sum equal to one-sixth part of the amount of such profits ; and (3), of the costs of the suit ; and (4), general relief.

The appellant put in his answer to the bill, and the case made by such answer was to the following effect : —

The earliest agreement between the firm of Bayley & Shaw and the respondent was in writing, and dated the 22d of January, 1850. The agreement of January, 1854, was a parol agreement, and accompanied by an express understanding and agreement between the respondent and the appellant that the amount of profits depending upon the course of trade, and all book-keeping, stock-taking, and the like necessary elements in ascertaining the same, should be ascertained, as had theretofore been the case, at the exclusive convenience and discretion of the partners in the firm ; and that the respondent should have no larger or other rights than he had previously had ; and, in particular, that he should take the statements and word of the appellant as to the

amount of profits to be accurate, true, and conclusive ;
* 336 * and that he should in no case be entitled to demand or question the business transactions of the firm or to examine or investigate their books or any of them, or to object to the statements of the amount of profits which the appellant should make to him.

This agreement was thenceforth acted upon by all parties until the dissolution of the partnership in October, 1856, and was never questioned or objected to by the respondent until after he quitted the appellant's service in January, 1863, the respondent having after Mr. Shaw's retirement continued in the appellant's service, upon precisely the same terms as before as to remuneration and otherwise, and no fresh agreement, terms, or conditions was or were entered into or suggested or discussed between the appellant and respondent.

The several stock-takings and the manner in which the amounts due to the appellant had been paid or secured were admitted, and it was alleged that the respondent had on no single occasion asked to examine the books or any of them, or inquired into the manner in which results were arrived at, nor had he in any manner objected to the statements of account or any of them, or asked for any proof or evidence in support thereof, or in any manner expressed doubt of or questioned their accuracy.

By an oral agreement of January, 1854, the salary or receipts of the respondent were raised from 140*l.* to about 300*l.* a year.

The net profits from May, 1860, to January, 1863, were about 5500*l.*, and the appellant alleged that he was then and always had been willing to pay to the *respondent one- * 337 twelfth of that sum, and had during the correspondence which had preceded the filing of the bill actually offered to pay the respondent 500*l.*, an offer which was declined.

Upon this answer coming in the respondent amended his bill, denying that the agreement of January, 1850, had any existence after the new agreement of January, 1854, or at any rate after the retirement of Mr. Shaw, when the respondent quitted the service of the firm and entered into a new agreement with the appellant; and also denying the express understanding and agreement which was alleged by the appellant to have accompanied the agreement of January, 1854, and also its being acted on as alleged, and also denying that after the dissolution of the partnership he continued in the appellant's service upon the terms and conditions alleged to have been come to in January, 1854, the real agreement come to after the dissolution having been as in the bill stated.

The appellant put in a voluntary answer to the amended bill, wherein he stated that he had on the dissolution of the partnership paid out to Mr. Shaw his entire capital, and charged that the respondent's duties and responsibilities continued exactly the same as they had previously been.

Mr. Selwyn and *Mr. Brooksbank*, for the appellant. — There is nothing illegal in a stipulation that a person shall receive a weekly salary, and in addition a sum proportioned to the amount of the profits of a business; and a person so situated is not a partner in the business. *Stocker v. Brockelbank*, (a) Lindley on Partnership. (b) On the facts of this case, therefore, no partnership * existed between the appellant and the respondent, * 338 and the question now before the Court is simply this; viz., whether a person who was not a partner, but only received a salary proportioned to profits, without any right to look at the books of the business, is now, before the hearing of the cause, entitled to

(a) 3 Mac. & G. 250.

(b) Vol. 1, p. 14, ed. 1; p. 20, ed. 2.

look at them. A similar point came before this Court in *Clegg v. Edmonson*, (a) on appeal from the Master of the Rolls, (b) who ordered an answer and production. On the appeal the point was not decided, but pressure was put by the Court on the respondents; and, as it turned out in the event, the decision of the Court on the merits of the case justified the non-render by the defendants of the accounts which were sought prior to the hearing. The present is a far stronger case than that. It will be said, on the other side, that *Adams v. Fisher*, (c) which is so fully commented on in Sir JAMES WIGRAM'S Essay on Discovery, has not been followed. Even admitting that to be so, still the Court ought not to go equally far in the opposite direction; and, circumstanced as this case is, we submit that it is clear from the principles to be deduced from *Jacobs v. Goodman*, (d) *Lloyd v. Wait*, (e) *Stainton v. Chadwick*, (g) *De la Rue v. Dickinson*, (h) that the order under appeal is wrong.

Mr. Baggallay and *Mr. Speed*, for the respondent. — The order under appeal is right, and the appeal, if successful, would unsettle the established practice of the Court, which requires a defendant, if he answer at all, to answer fully. Wigram on Discovery. (i) If the *appellant had wished to protect himself from the discovery sought, he should have pleaded instead of answering. The documents, the production of which is required, are, as the appellant in his affidavit has admitted, relevant to the matters in question in the suit, and he must therefore produce them. *Mansell v. Feeny*. (2) (k) *Clegg v. Edmonson* (l) was a case by itself, and has no application to the present.

(a) 8 De G., M. & G. 787, 798.

(e) 12 Sim. 103.

(b) Reported 22 Beav. 125.

(g) 3 Mac. & G. 575.

(c) 3 My. & Cr. 526.

(h) 3 K. & J. 388.

(d) 2 Cox, 282.

(i) Pages 86, 87, the passage beginning "The real question is," and ending "would not have been allowed;" p. 88, the passage beginning "Upon this assumption," and ending "to be gained by answering;" pp. 92, 93, the passages beginning "In the case before suggested," and ending "instead of going to an account before the Master;" pp. 97, 98, the passages beginning "If the plaintiff may ask a decree at the hearing," and ending "to take that decree upon imperfect evidence."

(k) 2 J. & H. 320.

(l) 22 Beav. 125; 8 De G., M. & G. 787, 798.

The partnership was denied there, and there was no admission of relevancy. In the present case it is not denied that the right of the respondent is one depending on the taking of the accounts of the business.

Mr. Brooksbank, in reply. — There is not in fact, nor does the bill set up as a fact, the existence of a partnership between the appellant and the respondent, and *De la Rue v. Dickinson* (a) shows that the position assumed by the appellant is maintainable on an answer as well as on a plea.

THE LORD JUSTICE KNIGHT BRUCE. — This is a special and extraordinary case, and one which cannot be governed by decisions in common cases.

The statements in the defendant's answers are, in my judgment, amply sufficient to exclude any right on the part of the plaintiff at this stage of the proceedings to * see the docu- * 340 ments which are objected to be produced, in order to ascertain the amount payable to him, whether it be one-sixth or one-twelfth of the amount of the profits of this business. There would have been a difference in the question before the Court if, assuming any enforceable right to inspect at all to exist, the present object had been the ascertainment whether the plaintiff was entitled to one-sixth or to one-twelfth of the amount of the profits. It cannot be necessary as to that controversy to enforce this production of the books before the hearing of the cause, and there would be too much inconvenience to the defendant, in reference to the actual circumstances, now to direct the production for any purpose. At the hearing it may be right, for some or other purpose, to a limited or to a not limited extent, to direct production and inspection. As to that I give no opinion; but now, especially having regard to the pleadings in this case, upon a mere interlocutory application, production must not be enforced.

The order of the Master of the Rolls must, therefore, be discharged, and the costs here and at the Rolls ought, unless my learned brother should think otherwise, to be costs in the cause.

THE LORD JUSTICE TURNER. — I also am of opinion that this order cannot be maintained.

There is no doubt that, as a general rule, where a plaintiff's interest is not disputed, all the documents admitted to be in the defendant's possession relating to the matters in issue must be produced. But where the plaintiff's interest and title are disputed, not all the documents, but only those which may be * 341 material to * the question to be decided at the hearing, ought to be produced.

In the present case the plaintiff asserts his title to an account, and further asserts that the production is necessary in order to ascertain what was in fact the proportion of his share of the profits. On the other side, the plaintiff's title is denied, and he is, in addition, met with a distinct statement that he has bound himself by express contract not to require production or inspection of the books. If that be so, there is no right to production or inspection, nor would production or inspection, if accorded, be of any assistance towards evidencing the plaintiff's title to an account. The books will only show how the question of amount should be decided.

Taking, therefore, the case of the plaintiff's right to a twelfth only to be established, there is no case for production before the hearing. That is not material, although production after the decree may be.

But it is said that there is a question whether the plaintiff is entitled to one-sixth or one-twelfth, and that the books may be material to show how the matter has been dealt with by the defendant in making his estimates on former occasions. That I understand to be the argument which was suggested on behalf of the plaintiff; which, however, was not pushed to its utmost extent.

No doubt, for the purpose I have mentioned, the books may be material; but that is a benefit which will be reserved for the plaintiff if at the hearing he makes out his right to a decree.

But at the hearing the defendant may make out that, * 342 whether the share be one-sixth * or one-twelfth, the plaintiff has bound himself by his contract not to demand inspection. If the Court at the hearing feels any difficulty upon the evidence upon that point, it can order the cause to stand over for the purpose of the limited investigation of the books.

The order of the Master of the Rolls must be discharged, and the present motion directed to stand over to come on with the hearing, when the costs of it will be disposed of by the Judge

who hears the cause. The costs of the appeal must be costs in the cause.

The cause accordingly went to a hearing before the Master of the Rolls, when, and upon the present motion, his Honor directed an account and ordered the production of the books in question. (a)

In the Matter of The JOINT-STOCK COMPANIES ACTS,
1856 and 1857 ; and

In the Matter of The SOUTHAMPTON, ISLE OF WIGHT,
AND PORTSMOUTH IMPROVED STEAMBOAT COM-
PANY, LIMITED.

HOPKINS'S EXECUTRIX'S CASE.

1864. April 13. Before the Lord Chancellor Lord WESTBURY.

Although the Bankrupt Law Consolidation Act, 1849, provided that orders of the Bankruptcy Court should be final unless appealed from within twenty-one days: *Held*, that where that Court acted in winding up a joint-stock company under the Acts of 1856 and 1857, it might rehear and rescind its order settling on the list of contributories a person who was dead at the date of the winding-up order.

THIS was an appeal by the official liquidator of the Southampton, Isle of Wight, and Portsmouth Improved Steamboat Company, Limited, herein after * called the company, from * 343 an order made by Mr. Commissioner FANE under the following circumstances : —

The company having been ordered to be wound up under the Joint-Stock Companies Acts of 1856 and 1857, and the name of one Edward Fitt Hopkins having thereupon been found upon the register of shareholders, that gentleman was by an order of the commissioner put upon the list of contributories.

It was subsequently discovered that at the date of the winding-up order Edward Fitt Hopkins was dead, and accordingly, at the

(a) 34 Beav. 105, *sub nom.* Turner v. Bayley.

instance of his executrix, the learned commissioner reheard the case, discharged his former order, and struck the name of Edward Fitt Hopkins off the list of contributories, without prejudice to any application which might be made to place the name of his personal representative on the list.

This was the order under appeal, and in support of the appeal,

Mr. Bayley, for the appellant, contended that the 12th section of the Bankrupt Law Consolidation Act, 1849, was imperative, and that when the list of contributories was once settled it was settled for all, and no jurisdiction existed in the commissioner to alter it; and that, even if it were not so, the name of the personal representative could not have been put on the list, as her name was not on the register of shareholders.

He referred to the Joint-Stock Companies Act, 1856, (a) and to *Carter v. Dimmock*. (b)

* 344 * *Mr. Daniel* and *Mr. Higgins*, for the executrix of Edward Fitt Hopkins, were not heard.

THE LORD CHANCELLOR.—The object of making out a list of contributories is to ascertain who are the persons upon whom a call may subsequently be made. It is a proceeding of the officer of the Court charged with the duty of winding up the company, and in what the learned commissioner has done I think that he has taken the only rational course, as it would have been idle to make a call upon a dead man.

As to the argument that the commissioner had no power to alter his original order, I think that he had, both as succeeding to the powers of the Master under the Winding-up Acts of 1848 and 1849, and as being the commissioner of a Court which must have the power of rehearing its own orders.

He must have the power to make the first step towards obtaining contribution conducive to those which are to follow.

This appeal is unfounded, and the appellant must pay the respondent her costs of it, but he may retain those costs, together with his own, out of the estate of the company.

(a) 19 & 20 Vict. c. 47, §§ 19, 95, 99.

(b) 4 H. L. Cas. 337. See also *In re Plumstead, &c., Water Company, Limited*, 2 De G., F. & J. 20.

* MATSON v. DENNIS.

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1864. April 28. Before the LORDS JUSTICES.

Where an equitable charge is vested in two persons even as joint-tenants, the money cannot be paid to one without special authority from the other, so as to discharge the estate which forms the security.

Where the purchaser of property under an administration decree declined to complete his purchase, upon the ground of the non-concurrence on a previous sale of one of two persons interested in the purchase-money: *Held*, that he must nevertheless bring the purchase-money into Court, the objection being one of conveyance and not of title.

THIS was an appeal by a purchaser under the decree in the above-mentioned suit — the object of which was to administer the estate of Samuel Dennis, the testator in the cause — from a decision of his Honor the Vice-Chancellor STUART upon an adjourned summons, whereby the appellant was ordered, with costs, to pay his purchase-money into Court.

The objection of the purchaser to complete the purchase, which led to the issue of the summons on which the order under appeal was made, arose under the following circumstances: —

On the 26th of May, 1832, and by an indenture of that date, the then owner of the property mortgaged it by way of demise for a term of 600 years to three gentlemen named respectively Waller, Chapman, and Roddam, to secure a sum of 3751*l.* 10*s.* and interest.

Subsequently the testator in the cause purchased the property, and the mortgage was paid off.

Connected with this latter transaction was the execution of a deed of release dated the 28th November, 1845. At this time Messrs. Waller, Chapman, and Roddam were all dead, and their respective personal representatives were the parties to the deed. There were also made parties to it two gentlemen named respectively M'Leay and Dykes.

The deed recited to the effect that a sum of 8000*l.*, * part * 346 of the whole 3751*l.* 10*s.*, had not been the money of Messrs.

Waller, Chapman, and Roddam, but had been advanced by Messrs. M'Leay and Dykes out of moneys belonging to them jointly and upon a joint account, and was still due to them upon that account,

and that the remaining 751*l.* 10*s.* had been the moneys of Mr. Roddam, and was then due to his personal representatives.

The deed witnessed that in consideration of 3000*l.* paid to Messrs. M'Leay and Dykes, and of 751*l.* 10*s.* paid to the executors of Mr. Roddam, the respective personal representatives of Messrs. Waller, Chapman, and Roddam did, by the direction of the testator in the cause, assign the aforesaid term, and the representatives of Messrs. Waller, Chapman, and Roddam, and also Messrs. M'Leay and Dykes, released the mortgaged property, and also released the original owner or his representatives and the testator in the cause from the debt of 3751*l.* 10*s.* and every part thereof.

This deed was duly executed by all the parties to it excepting Mr. M'Leay.

Receipts were endorsed upon the deed for the 751*l.* 10*s.* (as to which there was no question) and for the 3000*l.* which was expressed to be paid "to us," but this receipt was signed by Mr. Dykes only.

The testator in the cause continued in possession of the estate thus purchased until his death.

The property was offered for sale under the decree, subject to conditions of sale, one of which provided in effect that all recitals contained in deeds upwards of fifteen years old (which * 347 was sufficient to embrace the deed * of the 28th November, 1845) were to be taken as evidence of the facts which they stated.

Upon the delivery of the abstract and the discovery of the above facts, the appellant declined to complete the purchase unless a proper release of the property could be obtained from Mr. M'Leay in respect of his interest in the 3,000*l.* which it appeared had belonged to him and Mr. Dykes jointly.

In respect of the appellant's refusal to complete, it was stated, but without much evidence in favour of the statement, that at the date when the release of November, 1845, was executed Mr. M'Leay was dead.

Ultimately the question was brought before the Court on the summons upon which the order under appeal was made; viz., a summons taken out by the plaintiffs in the cause to compel the payment by the appellant of his purchase-money into Court.

Mr. Malins and *Mr. B. B. Rogers*, for the appellant. — The

present is a question between vendor and purchaser, and must be dealt with as such. We decline to complete the purchase without a proper release of the estate from all claim upon the part of Mr. M'Leay. It is not shown that he was dead at the date of the deed of November, 1845, or even that he is dead now. Therefore, even assuming that he and Mr. Dykes were joint-tenants of the 3000*l.*, there is no evidence that a title by survivorship had or has accrued to the latter. But in point of fact the assumption itself is unsustainable. When two persons lend money on mortgage, they are tenants in common of the mortgage money, although joint-tenants * of the mortgaged property. Coote on Mort- * 348 gages, (a) citing *Petty v. Styward*, (b) *Rigden v. Vallier*, (c) *Morley v. Bird*, (d) *White & Tudor's Leading Cases in Equity*. (e) The presumption of the tenancy in common as to the mortgage money is so strong that the fact need not be expressed in terms. *Robinson v. Preston*. (g) The *onus* is on the person who in any particular instance denies the existence of the fact to show — as is not shown here — that a joint-tenancy exists. And therefore it is that in well-drawn mortgages there is an express declaration, not only that the money belongs to the mortgagees on a joint account, but “that the receipt of the survivors or survivor shall be an effectual discharge: so as to negative the equitable inference that the money belongs to the lenders as tenants in common, and to enable the survivors to give a discharge without the concurrence of the personal representatives of those who have died.” Davidson's Conveyancing. (h) Even at law, though a release by one of several obligees would release the claim of the others, it would not discharge the security. Rolle's Abridgment; (i) Co. Litt. (k) The stipulation as to the binding efficacy of deeds upwards of fifteen years old can only refer to deeds which are properly such. The deed of November, 1845, was not in that category, as Mr. M'Leay never executed it.

Mr. Bacon and Mr. E. R. Turner, for the plaintiffs in the suit.
— The demand of the purchaser for a release from Mr. M'Leay

- (a) Page 532.
- (b) 1 Chan. Rep. 31.
- (c) 2 Ves. Sen. 252, 258.
- (d) 3 Ves. 628, 631.
- (e) Vol. 1, p. 151, 2d ed.

- (g) 4 K. & J. 505, 511.
- (h) Vol. 2, p. 538, 2d ed.
- (i) Vol. 2, p. 410, D.
- (k) Page 285 a.

* 349 or his representatives is futile. For nearly * twenty years no claim has been made by or on behalf of that gentleman : the term which was the security for the advance has been long since reassigned and become merged in the inheritance of the property ; and even assuming that the covenant with Messrs. M'Leay and Dyke was not extinguished by the execution of the release of November, 1845, by Mr. Dykes, the utmost remedy under it would be against the trustees of the term personally. Besides which, it appears from the recitals of the deed of November, 1845, that the money belonged to Messrs. M'Leay and Dykes jointly, and the conditions of sale bind the purchaser to accept that fact as true. We have given such evidence as we can obtain of the death of the former ; but independently of that, one joint creditor can release the joint debt.

Mr. Malins, in reply. — During the arguments reference was also made to *Harrison v. Barton*, (a) *Gibson v. Ingo*, (b) *Penny v. Watts*, (c) *Nicoll v. Chambers*, (d) and the Lord Justice KNIGHT BRUCE expressed his dissent from the mode in which the law was stated in the reference to *Petty v. Styward* in Eq. Cas. Abr., (e) and remarked, with reference to the *dicta* of Lord HARDWICKE in *Rigden v. Vallier*, (g) and Sir R. P. ARDEN in *Morley v. Bird*, (h) which had been referred to, that the learned Judges were referring, not to persons advancing money who before and at the time of the advance were joint-tenants of the money advanced, but to persons who, severally owning the money, came together and contributed in one sum.

* 350 * THE LORD JUSTICE KNIGHT BRUCE. — Two gentlemen named Dykes and M'Leay had, either as joint-tenants or as tenants in common, an equitable charge of 8000*l.* upon the property now in question ; and that property was vested in them both equitably, — be it as joint-tenants or be it as tenants in common, — clearly not as executors or administrators of any person, but in their own right. It was intended, on a former sale of the property, that they should be paid off, and they were both in consequence

(a) 1 J. & H. 287.

(b) 6 Hare, 124.

(c) 1 Mac. & G. 150.

(d) 11 C. B. 996.

(e) Vol. 1, p. 290.

(g) 2 Ves. Sen. 252, 258.

(h) 3 Ves. 628, 631.

made parties to the deed of conveyance as the persons to receive the 3000*l*. The deed of conveyance was, however, only executed by one of them, and he signed a receipt indorsed on the deed, acknowledging by such receipt the payment of the 3000*l*. "to us." The deed was not executed, nor was any receipt signed by Mr. M'Leay, who is not proved to have been dead at the time, nor is he indeed proved to be now dead.

The question is, whether when an equitable charge is vested in two persons, — and as I will assume as joint-tenants, — the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate.

In my judgment, and in the absence of special circumstances such as are not shown to exist in the present case, that cannot be done. The purchaser is entitled to have it taken here, that Mr. M'Leay was alive at the time, and that some money has, without any consent on his part, been paid to the other joint-tenant or tenant in common. That, I repeat, in my judgment, does not discharge the estate in equity. Especially in the case of vendor and purchaser, I think the purchaser has a right to say that the whole 3000*l*. was not shown to be discharged, * but that it is * 351 consistent with the evidence to suppose that it may be still an available charge in equity. It is very likely that there is no serious ground of danger to the estate on this point. There is this however: that it may in prudence necessitate special conditions when the present purchaser shall sell again, if he shall do so, which special conditions may alarm some purchaser or intended purchaser; and I think, therefore, that the appellant is entitled to have more proof than at present he has, that the charge of 3000*l*. no longer exists, and that our order should be made upon that footing.

The Lord Justice TURNER shortly referred to the facts and concurred, adding that that part of the order under appeal which directed the payment of the purchase-money into Court was right and ought to stand, because the title was good and the question raised only one of conveyance.

An order was made accordingly, by which the purchase-money

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was to be brought into Court: no costs were given on either side, but the costs of the plaintiffs in the suit were directed to be costs in the cause.

1864. February 13, 22, 23. May 3. Before the LORDS JUSTICES.

A corporate trade-mark, granted by the Cutlers' Company at Sheffield to a person not free of the company, is, so far as the special Acts governing the company are concerned, assignable.

Circumstances under which it was held that such a corporate trade-mark, and also an ordinary trade-mark, were upon principles of general law assignable and had in fact been assigned.¹

Per the Lord Justice TURNER: The question how far by the general law a trade-mark is assignable depends greatly upon the nature of the mark and the mode in which it has been used.

Observations on the difference in effect of a creditors' deed and a bankruptcy.

Upon the formation of a partnership with a person entitled to the benefit of a trade-mark, the mark, in the absence of express provisions in relation to it, becomes an asset of the partnership.

THIS was an appeal by the plaintiffs from the order made by his Honor the Master of the Rolls at the hearing of a motion for decree.

By the order under appeal his Honor declared that, upon the true construction of the partnership articles and the conveyance by the trustees of the creditor's deed, respectively herein after referred to, so far as the partners were concerned, the trustees had a right to assign the use of the corporate trade-mark, herein after referred to, to any person who should become the purchaser thereof, and that each of the partners had also the power to use this trade-mark either alone or in conjunction with any of the partners themselves, except so far as they had precluded themselves from so doing by any act of their own; and upon the defendant (who was the respondent on the present appeal) undertaking not to assign the trade-mark in question to any person whatever, his Honor further declared that the respondent was entitled to the

¹ See *Hall v. Barrows*, *ante*, 150, and cases in note (3); *The Leather Cloth Co. v. The American Leather Cloth Co.*, *ante*, 137, and cases in note (1).

use of it either by himself alone or in partnership with any other person. His Honor gave no costs on either side, and stayed all further proceedings, with general liberty to apply.

The order under appeal contained nothing with reference * to, and his Honor declined to make any order with refer- * 353
ence to, the trade-mark, "Wm. Ash & Co.," herein after referred to.

The circumstances under which the order under appeal was made, and which led to the institution of the suit, and the nature of the suit itself, were as follows: —

The suit was originally instituted by the appellant Henry Bury against the respondent, who had been one of the partners of the late firm of Bedford, Burys, & Co., for (1) an injunction to restrain the respondent from using and from granting or attempting to grant to Messrs. William Butcher & Co., or to any persons whomsoever, the right to use a corporate trade-mark mentioned in the bill to have been granted to the respondent by the Cutlers' Company at Sheffield, or the mark "Wm. Ash & Co.," or other marks of the late firm of Bedford, Burys, & Co., in any manner whatsoever, or from otherwise preventing or hindering or attempting to prevent or hinder the appellant or his agents from having or enjoying the sole and exclusive use of the said trade-marks; (2) an order, if necessary, upon the respondent to surrender the said corporate trade-mark to the Cutlers' Company, in order that the same might be regranted by the said company to the appellant or as he should direct; (3) the delivery up by the respondent to the appellant of the stamps or stamp of the said trade-marks and all circulars, lists of prices, and other papers and documents having thereon engravings of the said trade-marks; and (4) general relief.

The appellant Henry Bury claimed to be entitled to the relief thus sought by him under or by virtue of a purchase of the joint estate of the partners in the late firm of Bedford, Burys, & Co., from the trustees of a * creditors' deed executed by * 354
the members of that firm. The appellants Edward James Bury, William Tarleton Bury, and John George Thomas Child, who, since the institution of the suit, had become purchasers of the interest of the appellant Henry Bury under his purchase, were made coplaintiffs in the suit under the usual supplemental order.

The Cutlers' Company at Sheffield had, for a great length of time, under the provisions of several Acts of Parliament passed for that purpose, had and exercised the power of granting trade-marks to persons engaged in the manufacture of iron and steel in and in the neighbourhood of Sheffield; and the principal trade-mark in question in this suit was assigned by the company to the respondent in the month of August, 1846, by an instrument in which he was described as a non-freeman.

The mark in question consisted of the figure of a lion couchant surmounted by crossed arrows with four initial letters, viz., J. O. B. S., within the spaces formed by the arrows, which were to be read as signifying John Bedford, Oughtibridge and Sheffield.

The other mark, "Wm. Ash & Co.," mentioned in the bill, had, it appeared, been acquired by the respondent by purchase some time previous to the year 1856.

The partnership firm of Bedford, Burys, & Co., was first formed in the year 1856, before which time the respondent had for several years carried on trade alone. The partnership firm consisted at its first formation of the respondent, the appellants Edward James Bury and William Tarleton Bury and John Jepson, and the articles of partnership of this firm were dated the 1st of July, 1856.

* 355 * In the year 1859 Richard Allinson was admitted into the partnership, and new articles of partnership were made between the partners.

By these articles of partnership, which were dated the 16th of July, 1859, it was, amongst other things, agreed that the said parties thereto should become copartners at certain works called the Regent Works, in Sheffield aforesaid and elsewhere, for the term of ten years from the 30th of June, 1859, on the terms and conditions therein mentioned. And it was, amongst other things, declared and agreed, that all goods, steel, and merchandise which should thereafter be made, manufactured, or sold by the said partnership should be marked with the corporate mark granted to the respondent by the corporation of Cutlers within the liberty of Hallanshire, in the county of York, with or without the name John Bedford or Bedford alone, or with such other name or mark or otherwise as the parties thereto should thereafter mutually agree upon, and all such corporate or other marks, except the name John Bedford or Bedford, should be deemed the property of

the copartnership during the continuance of the copartnership and of the lives of the parties thereto, in manner therein after mentioned. And it was thereby provided that the death of any partner during the continuance of the copartnership should not prejudice or affect the copartnership in the use of any corporate mark or name. And it was thereby declared that the corporate mark granted to the respondent should thenceforth be treated as a partnership asset; and that it should be lawful for the parties thereto, or any of them, at the end or other sooner determination of the copartnership, to have the free use and enjoyment of the said mark for the remainder of their lives, either alone or in partnership with any other person or persons. And further, that in case the respondent should depart * this life during * 356 the continuance of the copartnership, the surviving partners for the time being should pay to his executors or administrators the sum of 500*l.* in lieu of all claim in respect of the said mark, which sum of 500*l.* the surviving partners of the copartnership thereby agreed as between themselves should be taken from their profits of the said concern, and should be added to the share of capital of the respondent, and be payable and be paid in like manner as the capital belonging to the respondent at the day of his decease. And the respondent covenanted with the others and other of the parties thereto, that the said corporate mark so granted to him as therein mentioned should at all times thereafter be used and enjoyed by the copartnership and by the parties thereto in manner aforesaid, and should become and be the property of the copartnership and be treated like the other assets of the said concern.

In the year 1861 the firm became embarrassed, and by an indenture bearing date the 18th of November, 1861, and made and executed between and by the respondent, the appellants Edward James Bury and William Tarleton Bury and John Jepson and Richard Allinson (therein called the debtors) of the first part, James Henry Barber, George Brown, and the appellant John George Thomas Child (therein called the trustees) of the second part, and the several other persons whose names were thereto written and seals affixed, being creditors of the debtors (therein after referred to as the creditors), of the third part, all the freehold, copyhold, leasehold, and other real estates, messuages, works, lands, hereditaments, rights, and premises of them the

said debtors jointly, and of each and every of them separately, of whatever nature or kind and wheresoever situate, and whether of a legal or equitable nature, or over which they or any of * 357 them had any power of appointment, and also *all the stock in trade, goods, merchandise, materials, tools, implements, fixtures, books of account, debts, claims, moneys, securities, stocks, vouchers, papers, household furniture, plate, linen, china, and other household effects, and all other the personal estate and effects of the said debtors jointly, and of each and every of them separately, whether in possession, reversion, remainder, or expectancy, together with possession of all works, grounds, manufactories, lands, messuages, buildings, premises, and places where any of the property aforesaid, being personal estate, might be, together with full power to demand, sue for, recover, and receive any moneys and effects, and to give discharges for the same, in the names or name of the debtors or any of them, were granted, conveyed, assigned, and delivered up by the debtors unto and to the use of the trustees, their heirs, executors, administrators, and assigns, upon trust to permit the debtors to carry on the business for the benefit of their estate, under the inspection and subject to the control of the trustees, for such period, not exceeding twenty-eight days from the date thereof, as the trustees should think fit; and subject thereto, upon further trust, at such time as the trustees should think fit, to sell and dispose and convert into money all such parts of the said trust estate and premises as were of a salable and convertible nature, and get in the other parts thereof, with power nevertheless for the trustees to postpone the sale and conversion of all or any part of the furniture or other private estate of the debtors respectively or any of them, until after the joint estate of the debtors should have been realized; and with power also to suspend for such period as they should think expedient the sale or conversion or getting in of the joint estate of the debtors, or any part or parts thereof, and meanwhile to carry on the said trade on behalf and for the benefit of the creditors; and upon trust out of the moneys which should * 358 * arise from the sale, conversion, and getting in of the said trust estate, and from the profits and income to be received and derived from the same, and from the temporary carrying on of the said trade as aforesaid, to pay expenses in manner therein mentioned; and in the next place (so far as the same might

extend) to pay and satisfy ratably and without preference (administering all assets, however, in like manner as in bankruptcy) the several debts and sums due to all the joint creditors of the debtors, reckoning such creditors to be creditors in respect of such amount only as upon account fairly stated, after allowing according to the provisions of the bankrupt law the value, if any, of mortgage securities and other such available securities or liens, should appear to be the balance due to them respectively from the debtors, and to pay the ultimate residue, if any, of the said moneys and proceeds of the said estate and effects, after satisfying the whole of the said creditors the full amount of their said debts with interest thereon, to the debtors, in like manner as in bankruptcy.

The indenture now in statement contained, amongst other things, provisions as to the mode in which the sale and conversion into money and realization of the assets was to be effected, and a power to the trustees to contract for the sale of and to sell the trade and trade plant, debts, and effects as a going concern to any person or persons for such sum of money, and payable or secured to be paid at such time as the trustees should think fit, provided, howsoever, that such contract and sale last mentioned, and the terms thereof, should be subject to the approval of a meeting of creditors convened as therein mentioned.

The indenture also contained a covenant for further assurance by the debtors.

* This deed was duly registered under the bankruptcy * 359 Act, 1861, and soon afterwards an arrangement was come to with the separate creditors of the respondent, which was carried into effect by an indenture bearing date the 18th of February, 1862, the nature of which, sufficiently for the purpose of this report, appears from the reference to it in the judgment of the Lord Justice TURNER, from which judgment the present statement is in the main taken.

In the mean time an indenture, dated the 16th of January, 1862, had been made and executed between and by the respondent of the first part, the appellant Edward James Bury of the second part, the appellant William Tarleton Bury of the third part, John Jepson of the fourth part, and Richard Allinson of the fifth part, whereby, after reciting therein that a doubt had arisen whether the indenture of the 18th of November, 1861, was or was not by

virtue of the Bankruptcy Act, 1861, or otherwise, a legal dissolution of the partnership between the said parties, and that for the removal of such doubt it had been agreed by the said parties that they should publish in the London Gazette a notice of the dissolution of their partnership and enter into the mutual release therein after contained, it was witnessed and mutually agreed and declared that the partnership therein mentioned, and all other partnerships (if any) between them upon the date and execution of the indenture of the 18th of November, 1861, or which might then be existing between them, should be and the same was and were thereby dissolved; but it was thereby provided that nothing therein contained was meant or intended to affect the relation or liability in which the parties thereto stood to their creditors (whether joint or separate), or to each other in respect of such creditors, or to the trustees acting under the indenture of the 18th of Novem-

* 360 ber, * 1861, or to interfere with or affect the provisions of such deed or the obligations of the parties thereto thereunder.

From the time of the execution of the creditors' deed of the 18th of November, 1861, until the month of March, 1862, the partners in the late firm, under the inspection of the trustees of the creditors' deed, carried on the business of the firm, using the marks of the firm for that purpose.

In the month of March, 1862, the trustees sold the business to the appellant Henry Bury. This sale was carried into effect by an indenture bearing date the 12th of March, 1862.

This indenture was made and executed between and by James Henry Barber, George Brown, and the appellant John George Thomas Child of the first part, the appellants Edward James Bury and William Tarleton Bury of the second part, Priscilla Susan Bury of the third part, and the appellant Henry Bury of the fourth part.

It recited, amongst other things, that certain expenses of the trustees by the appellant Henry Bury agreed to be paid had been paid by him, and that the sum of money to be paid by him for the purchase of the joint real and personal estate, credits, and estates of the late firm of Bedford, Burys, & Co. would amount to 32,849*l.*, which sum it had been agreed should be paid to the trustees of the indenture of the 18th of November, 1861, upon and for the trusts and purposes of such indenture, and in the mean time should be secured to them by the covenant of the appellant Henry Bury in manner therein after appearing. It also recited

that the 32,849*l.* had been apportioned as follows; viz., 29,782*l.* for the *merchandise and stock at Sheffield of the *361 said late firm, and for all the merchandise and patterns of the said late firm abroad, and for the effects of the said late firm being capable of passing by delivery, and 3067*l.* for the other property and effects of the said late firm intended to be thereby assigned and conveyed or assured. It then recited an agreement between the trustees and the appellant Henry Bury, that the latter, his executors, administrators, and assigns, should hold or enjoy the whole of the joint real and personal estates, credits, and effects purchased by him as therein mentioned, free from any lien or claim by or of the trustees for or in respect of unpaid purchase-money, and that in pursuance of the said arrangement, with the approbation of the creditors and in consideration of the appellant Henry Bury's covenant therein after contained, the said merchandise in stock at Sheffield of the said late firm, and the said merchandise and patterns of the said late firm abroad, and other effects of the said late firm being capable of passing by delivery, had been delivered by the trustees to the appellant Henry Bury, and were then in his possession.

The indenture then witnessed, that in pursuance of and for further effectuating the said arrangement between the appellant Henry Bury and the trustees, with the approval of the creditors, and in particular for assigning and conveying such of the said joint real and personal estates, credits, and effects of the late firm of Bedford, Burys, & Co., as were not included in the premises or things so as aforesaid delivered by the trustees to the appellant Henry Bury, or as had not passed to him by such delivery, and in consideration of 3067*l.*, the apportioned consideration for the premises intended to be thereby assigned and conveyed, or assured to be paid by the appellant Henry Bury, and in consideration of his covenant therein after contained, so far *as it *362 related to the said apportioned consideration or purchase-money of 3067*l.*, John Henry Barber, George Brown, and the appellant John George Thomas Child, the trustees, did and every of them did thereby grant, bargain, sell, assign, and convey to the appellant Henry Bury, his heirs, executors, administrators, and assigns, all such and so much and such parts and part of the joint real and personal estate, credits, and effects of the said late firm of Bedford, Burys, & Co., assured by or comprised in the said

indenture of the 18th of November, 1861, as aforesaid as were not or was not included in or amongst the said merchandise and premises by the trustees delivered to the appellant Henry Bury as therein before mentioned, or as had not effectually passed to him by such delivery as aforesaid by the trustees, or otherwise than by the indenture now in statement; and also all the estate, interest, and demand of the trustees which they had or might have any power to assign or transfer in and to or respecting the said estate, right, and premises expressed to be thereby assigned, and in particular all the separate rights and interests of the aforesaid several partners which under or by virtue of the said indenture of the 18th of November, 1861, or otherwise were assigned to or were vested in the trustees, and which they had or might have any power to assign or transfer to and in the said corporate mark of the said Corporation of Cutlers, and to and in all other corporate or trade-marks belonging to or used by the said firm, or the right of using such corporate marks or any of them upon the expiration or other sooner determination of the said partnership, together with full possession of and right of entry in order to take and keep possession into all the works, grounds, manufactories, lands, buildings, premises, and places where any of the property aforesaid, being personal estate or effects, might be, and with a full power of attorney to hold the same

* 363 estates, rights, *and premises aforesaid (subject as to leaseholds to the rents and covenants affecting them), unto and to the use of the appellant Henry Bury, his heirs, executors, administrators, and assigns absolutely, discharged from the trusts and purposes of the indenture of the 18th of November, 1861, and from any lien or claim in equity of or by the trustees as vendors or otherwise for unpaid purchase-money.

The appellant Henry Bury then covenanted for payment of the whole 32,849*l.* in manner therein mentioned, the money to be applied in paying the creditors of Bedford, Burys, & Co. twelve shillings in the pound as dividends in manner therein mentioned.

By another deed, bearing date the 15th of March, 1862, the creditors of the firm released the partners upon receiving bills of exchange for the amounts of the dividends payable to them respectively.

The respondent having soon afterwards come to an arrangement with Messrs. Butcher & Co., by which he authorized them to use

the trade-mark granted by the Cutlers' Company, the bill in this cause was filed on the 21st of May, 1862; and the appellant Henry Bury having afterwards, in the month of December, 1862, assigned his interest under the purchase made by him to the appellants Edward James Bury and William Tarleton Bury and John George Thomas Child, the supplemental order above referred to was obtained.

There was a good deal of evidence in the cause, referring in part to the question whether trade-marks granted by the Cutlers' Company could or could not be assigned, but principally, so far at least as the evidence * on the part of the respon- * 364 dent was concerned, to facts and circumstances, leading, as was contended on his part, to the conclusion that the trade-mark granted to the respondent by the Cutlers' Company was not intended to pass, and did not pass, to the appellant Henry Bury, or through him to the other appellants, by the deeds above mentioned.

The case, however, appeared to have been disposed of at the Rolls without reference to this evidence, and for the reasons appearing from the judgment of the Lord Justice TURNER it is not necessary to do more than state the purport of it, and to say that its length was the subject of remark by the Lord Justice KNIGHT BRUCE during the argument. (a)

The Master of the Rolls made the decretal order now under appeal on the 23d of June, 1863.

Mr. Selwyn and *Mr. E. Bury* appeared for the appellants, and

Mr. Hobhouse and *Mr. Rendall*, for the respondent.

The scope of the arguments on either side so fully appears from the judgment of the Lord Justice TURNER, that it is unnecessary further to refer to them.

The authorities referred to were as follows: *Hall v. Barrows*, (b) *Burrows v. Foster*, (c) *Clark v. Leach*, (d) * *Chur-* * 365

(a) See also on this point *Traill v. Baring*, *supra*, pp. 318, 327, 332.

(b) *Supra*, p. 150.

(c) Before the Lords Justices, 8th May, 1862, Reg. Lib. 1862, A. 941; S. C., 1 N. R. 156.

(d) 1 De G., J. & S. 409.

ton v. Douglas, (a) Cruttwell v. Lye, (b) The Leather Cloth Company, Limited v. The American Leather Cloth Company, Limited, (c) Perry v. Truefitt, (d) The Collins Company v. Brown. (e)

As to the assignability of the corporate trade-mark, the Acts governing the Cutlers' Company, which are referred to in the judgment of the Lord Justice TURNER, and also another special Act of the company, 23 & 24 Vict. c. 43, were cited, and also an opinion of the late Lord Chief Justice TINDAL, when at the bar, which was thus referred to in the 4th paragraph of the respondent's answer:—

“ I say that the only mode by which a transfer of a right to a Sheffield corporate trade-mark is capable of being effected during the life of a person entitled thereto is by means of a surrender thereof to the company, and a regrant thereof by the company on payment of the fees provided for by the Acts of Parliament before referred to, in the event of the company thinking proper to make such regrant; and I say that to obviate all doubt on the subject of the inability of the grantees of such corporate trade-marks to assign the same, the question whether the right to such trade-marks would pass by a general assignment for the benefit of creditors was raised in the year 1822 upon an assignment executed by one Peter Cadman of all his estate and effects for the benefit of his creditors, and submitted on the part of the company to the late Lord Chief Justice TINDAL while he was practising at the bar; and I say that the following opinion given upon such case was entered upon the books of the company and has

* 366 ever since been acted * upon and treated as conclusive:

‘ I think that the right to the mark in question did not pass under the assignment to Cadman's assignee. Looking at all the regulations relating to marks inserted in the several Acts of Parliament, I think the necessary inference to be drawn is, that they are not assignable by act of the party except by his last will. They appear to be confined to the person himself during his life to whom they are originally granted, with a power to dispose thereof by will, so as not to deprive the widow of the use of it during her natural life.’ ”

(a) Johns. 174.

(c) *Supra*, p. 137.

(e) 3 K. & J. 423.

(b) 17 Ves. 335.

(d) 6 Beav. 66.

The 21st, 22d, and 23d paragraphs of the amended bill, which were referred to in the judgment of the Lord Justice KNIGHT BRUCE, were respectively as follows :—

“ 21. A short time ago the plaintiff discovered, as the fact was, that the defendant John Bedford had entered into negotiations with Messrs. William Butcher & Co., a firm in the steel trade at Sheffield, and had granted to them the use of the corporate trade-mark and other trade-marks which had been previously sold and assigned to the said assignees, and by them to the plaintiff, as herein before mentioned, and that such firm had issued circulars announcing the fact to several of the customers of the late firm of Bedford, Burys, & Co.

“ 22. The plaintiff's solicitors immediately communicated with the members of the said firm with whom the said John Bedford had entered into such negotiations as aforesaid, and informed them of the plaintiff's rights with respect to the said corporate and other trade-marks ; and on learning what the facts were with respect thereto, and which were as herein before mentioned, the said firm gave an assurance to the plaintiff that they would not use the same until the plaintiff had settled with the defendant as to their relative rights thereto.

* “ 23. It is alleged by the defendant John Bedford, that * 367 the plaintiff is not entitled to the sole and exclusive use of the said corporate and other trade-marks, but that the defendant is also entitled to use the same, either alone or in partnership with any other person, and that he is also entitled to grant the use of the same to any persons he may think proper, and the defendant has begun so to use the same, and he has also granted the use thereof to other persons. But the plaintiff charges, as the fact is, that the said corporate and other trade-marks were by the aforesaid articles of partnership expressly declared to be, and the same, as well as the other trade-marks of the said firm, were assets of the said late partnership of Bedford, Burys, & Co., and that the said corporate and other trade-marks, and the sole and exclusive right to use the same and the other marks of the said late partnership, passed to and became vested in the said trustees under and by virtue of the said indenture of the 18th day of November, 1861, and that the same trade-marks, and the sole and exclusive right to use the same, passed to and became vested in the plaintiff under

and by virtue of the said indenture of the 12th day of March, 1862."

At the close of the arguments their Lordships reserved judgment.

May 3.

The Lord Justice TURNER, after stating the facts of the case down to and including the decretal order under appeal to the effect of the statements herein before contained, proceeded as follows:—

The plaintiff has appealed from this decree, contending, first, that it has not given him adequate relief with respect to the trade-mark granted by the Cutlers' Company; secondly, that no
* 368 relief has been given to him * with respect to the trade-mark "Wm. Ash & Co.;" and thirdly, that it has not given him the costs of the suit, at all events so far as relates to the greater part of the evidence adduced on the part of the defendant.

It will be convenient to consider the case separately with reference to the trade-mark granted by the Cutlers' Company and to the mark "Wm. Ash & Co."

First, then, as to the trade-mark granted by the Cutlers' Company.

It was first contended on the part of the defendant, the respondent to this appeal, that trade-marks granted by the Cutlers' Company are not assignable.

It was so contended on two grounds: first, that by the company's special Acts the marks granted by them are rendered incapable of assignment; and secondly, that by the general law the particular mark in question could not be assigned.

As to the first of these grounds, however, it does not appear to me that this case falls within the company's Acts. The first of these Acts, 21 Jac. 1, c. 31, is in terms repealed by the 31 Geo. 3, c. 58, § 1, except as to matters in no way affecting the assignability of the marks granted by the company. This Act of 31 Geo. 3, c. 58, confined the trade to the freemen of the company (sect. 20), and provided for marks being granted to them. The 23d section of this Act therefore must, as I conceive, be taken to have had reference only to marks granted to such freemen. The Act of 41 Geo. 3, c. 97, again relates, as it seems to me, exclusively to marks which have been granted to freemen of the company;

but then the Act 54 Geo. 3, c. 119, empowered the company to grant marks to other persons than those who were free * of the company; and as to the marks so granted, I see * 369 nothing which can in any way affect their assignable character, for the 6th section of this Act is in terms confined to marks which have been granted to freemen of the company.

Upon this short ground, therefore, independently of all considerations as to the effects of these Acts on the assignability of marks granted to freemen of the company, as to which it does not seem necessary for us to give any opinion, I think that the argument of the respondent as to the operation of these Acts cannot be maintained.

Nor do I think that the argument on his part as to this particular mark not being by law assignable is in any respect more tenable. It was attempted to maintain this argument upon the ground that this was a mere personal mark, and that the effect of allowing such a mark to be assigned would be to enable the assignee of the mark to represent the goods manufactured by him to be goods manufactured by the assignor, a purpose which could not, as it was said, be recognized by the law; and cases were referred to on this point, particularly the cases of *Hall v. Barrows* (a) and *The Leather Cloth Company, Limited v. The American Leather Cloth Company, Limited*. (b) But without going the length of saying that a mark may not in some cases be so completely personal as of necessity to import that the goods sold under it have been manufactured by a particular individual, and that the assignability of such a mark may not be open to objection on that ground, although the objection would, as it seems to me, apply rather to the use of the mark when assigned than to the power of assigning it, I think that all cases of this description * must depend upon * 370 their particular circumstances. Much must, I think, depend upon the nature of the mark and the mode in which it has been used. It is evident that a mark, although it may in some respects indicate the person by whom the goods have been manufactured, may refer much more closely to the place of manufacture than to the person of the manufacturer: and it is not less evident that a mark, although personal in its inception, may, from the mode in which it has been used, have become appropriated to goods manu-

(a) *Supra*, p. 150.(b) *Supra*, p. 137.

factured at particular works : and applying these considerations to this case, looking to the character of this mark and to the mode in which it has been used from the year 1856, when the defendant ceased to be alone interested in it, it cannot, I think, be said that there was any thing in its nature or character to prevent the assignment.

Assuming this mark, however, to have been capable of assignment, it was insisted on the part of the respondent that it had not been in fact assigned to the plaintiff Henry Bury.

First, it was said that it never became the property of the partnership subsisting under the articles of 1859, otherwise than for the use of that partnership during its continuance and of the partners during their lives, either alone or in partnership with other persons ; secondly, it was said, that whether it ever became the property of this partnership or not, it was not assigned to the trustees under the creditors' deed ; and thirdly, it was said, that assuming it to have been assigned to the trustees of the creditors' deed, it had not become vested in the plaintiff Henry Bury under the assignment to him.

As to the first of these points, that the articles of 1859
* 371 secured the use of this mark to the partnership during * its continuance and to the several partners during their lives after its determination, seems to me to be beyond all doubt ; but whether, subject to this interest of the partnership and of the partners, the mark was intended to be an asset of the partnership, or to belong to the defendant John Bedford, seems to be a question of much difficulty. Upon this question, however, it is also, I think, unnecessary for us to give, and I do not mean to give any opinion ; for I think, upon the second point, that whatever interest the defendant John Bedford had in the mark, or in the use of it, whether as partner during the continuance of the partnership, or during his life after its determination or after the deaths of the partners, if, as contended on his part, he was then alone entitled to it, passed to the trustees under the creditors' deed ; for by that deed not only the joint estate of the partners, but the separate estate of each of them, was passed to the trustees.

Two arguments were urged on the part of the defendant in opposition to this view. First, that the deed ought not to be construed to have any more extended effect than a bankruptcy would have had, and the interest in question would not, it was said,

have passed to assignees under the bankruptcy of the defendant ; and, secondly, that the deed proceeded upon an estimate of the assets, and that the interest of the defendant in the mark in question was not included in that estimate.

As to the first of these arguments, I think it sufficient to say, that it is, as I apprehend, a very different question what will pass by contract and what will pass under a bankruptcy, and that the case we have to deal with here is a case of contract and not of bankruptcy. I abstain from giving any opinion whether this interest of the defendant would have passed under a bankruptcy, and I * do so the more readily as I observe that an * 372 opinion, which may be considered to have some bearing upon the point, was given by the late Sir NICHOLAS TINDAL, for whose opinion I, in common with all the profession, have always entertained the highest possible respect. It may be right, however, to say, that I doubt whether that opinion was given with reference to such a case as the present, or even to the Statute of the 54 Geo. 3. The terms of the creditors' deed were, in my judgment, sufficient to pass any interest which the defendant had in the mark, either as a partner or otherwise ; and with reference to the argument founded on the value of the mark not having been included in the estimate of the assets, I think it unnecessary to say more than that if the benefit of the mark passed by the deed, we can give no weight to the argument, there being no cross-bill to reduce the deed ; but I desire to be understood as not giving any encouragement to such a cross-bill, my opinion being that the deed has not gone beyond the intention of the defendant.

The right to the mark, then, appearing to have been passed to the trustees of the creditors' deed, did it or not pass to the plaintiff Henry Bury by force of his purchase deed ?

It was contended for the defendant that it did not.

First, it was said that before the purchase by the plaintiff Henry Bury it had been assigned to Hawksley by the deed of February, 1862 ; and, secondly, that whether it had been so assigned or not, the purchase by the plaintiff Henry Bury was of the joint estate only, and the trustees had no power to assign and had not assigned the separate rights of the partners in the mark in question.

* I have no doubt, however, that the deed of February, * 373 1862, did not pass to Hawksley any interest whatever in'

this mark, and that notwithstanding that deed the separate interests of the partners in this mark remained vested in the trustees to be dealt with by them under the trusts of the deed; and as to the powers of the trustees, I think that the partners having assigned their separate interests to the trustees, could not set up against them the interests which they had so assigned. Those interests could not, as it seems to me, be considered to subsist consistently with the purposes of the creditors' deed. The business could not be carried on by the trustees, nor could any sale be advantageously made by them if those interests were held to be subsisting. So far, therefore, as the purposes of carrying on the business and of sale are concerned, these interests cannot, as I think, be taken to have been subsisting; and whether they would have subsisted for the purpose of the distribution of the proceeds of the sale would be a question between the joint and separate creditors with which the purchaser would have no concern. In my judgment, therefore, this point also fails the defendant.

Some argument was attempted to be raised on the part of the defendant with reference to the effect of the parol evidence, as tending to show that this trade-mark could not have been intended to be, and was not, brought into the partnership; but whether brought into the partnership or not, I feel no doubt that it was intended to be and was passed to the trustees under the creditors' deed; and this evidence therefore does not appear to me to have any important bearing upon the case.

Upon the whole, the conclusion at which I have arrived is, that the plaintiffs are right in their contention as to this trade-mark, and that the decree has not gone far enough in this respect, but that there ought to be an injunction to restrain the use of it by the defendant Bedford as prayed by the bill.

Then as to the mark "Wm. Ash & Co." This part of the case is not embarrassed by the special provisions which are found in the deeds as to the trade-mark granted by the Cutlers' Company. It rests, as it seems to me, upon the simple question whether upon the formation of a partnership with a person entitled to the benefit of a trade-mark, the trade-mark does not, in the absence of express provision in relation to it, become an asset of the partnership; and in my judgment it does; for the whole trade is carried into the partnership, and the trade-mark is but an element of the trade. But in this case, whether this trade-mark was carried

into the partnership or not, I think it passed to the trustees under the creditors' deed, and then the same reasons which apply to the company's trade-mark apply to this mark also.

I think, therefore, that in this respect also the decree has not gone far enough, and that the injunction prayed by the bill ought to have been granted as to this mark also.

There remains then only the question of costs, and in this respect I am not disposed to vary the decree. The case is not free from difficulty, and the defendant cannot be blamed for having taken the judgment of the Court upon it; nor for having brought forward such evidence as might possibly in the view of the Court have affected the decision. Moreover, there has been conduct on the part of the plaintiffs Edward James Bury and William * Tarleton Bury which this Court cannot regard * 375 with approbation.

I think, therefore, that the decree ought not to be varied as to costs, and that there should be no costs of the appeal.

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me that by law the right to use the corporate trade-mark, and the right also to use the other trade-mark particularly mentioned in the bill in this cause, were matters of property capable of assignment; that the defendant, Mr. Bedford, previously to the 18th of November, 1861, had acquired an interest or interests and an ownership, partial at least, in those marks; but that, by force of the instruments of the 18th of November, 1861, the 16th of January, 1862, and the 12th of March, 1862, all stated in the bill, the whole of his right to use and the whole of his proprietorship and interest in each of those marks were for valuable consideration effectually assigned to the plaintiff and became effectually vested in him.

The 21st, 22d, and 23d paragraphs of the amended bill are, I think, sufficiently accurate and well founded in point of fact to justify and support the greater and substantial part of the first paragraph of its prayer.

The decree under appeal, however, limits and restricts the relief granted to the plaintiff by giving him less than that to which I have already stated myself to think him entitled, and I acknowledge myself accordingly not to agree with it.

* 376 * My learned brother differs also, as he has stated, from it.

As to the costs, I doubt, — a doubt which his opinion seems to render immaterial.

* 377 * In the Matter of The COMPANIES ACT, 1862,

AND

In the Matter of The EXHALL COAL MINING COMPANY,
LIMITED.

1864. May 6. Before the LORDS JUSTICES.

A lessor distrained for rent upon goods which were upon the demised lands, and which belonged to a joint-stock company. The distress was put in after the presentation of a winding-up petition against the company, upon which an order was made subsequently to the putting in of the distress. The demised lands were held by trustees for the company: *Held*, that the distress might proceed.

Per the Lord Justice TURNER: The Companies Act, 1862, § 163, only avoids attachments, sequestrations, distresses, or executions when leave to put them in force has not been given under sect. 87.

THIS was an appeal by the official liquidator of the Exhall Coal Mining Company, Limited, from an order of the Master of the Rolls, whereby, on the petition of the respondents, who were the representatives of the lessor of lands occupied by the company, his Honor gave them leave to remove and sell certain goods belonging to the company which they had seized under a distress for an arrear of rent.

The lands in question were leased to certain persons who declared themselves, by an independent instrument, trustees thereof for the company, and the lease contained an express power of distress.

The company was registered under the Joint-stock Companies Act, 1856; but was never registered under the Companies Act, 1862. On the 6th of February, 1864, a winding-up petition, under the last mentioned Act, was presented against the company, on which an order was subsequently made.

Earlier, however, on the day on which this order was made the

distress, which it was the object of the petition to effectuate, was put in.

Mr. Southgate and *Mr. Wickens* appeared for the appellant, and

* *Mr. Baggallay* and *Mr. W. Pearson*, for the respondents. * 378

For the appellant it was contended that the distress was void under the 163d section of the Companies Act, 1862, the 84th section fixing the date of the commencement of the winding up as the date of the presentation of the winding-up petition, and the language of the 163d section showing that the word "proceeding" in the 85th and 87th sections did not include distresses; and attention was called to the mode in which the rights of a distraining lessor were curtailed in bankruptcy under the Bankrupt Law Consolidation Act, 1849, section 129.

For the respondents it was contended that, under the 85th and 87th sections of the Companies Act, 1862, the Court had a discretion to allow the distress to proceed; and reference was made to *In re The Great Ship Company, Limited, Parry's Case*. (a) It was urged that the only way of reconciling the 85th and 87th sections with the 163d section of the Act was to hold that the 163d section had reference to such attachments, sequestrations, distresses, or executions only as were put in force against the estate or effects of the company without the sanction of the Court; and stress was laid upon the unreasonableness of holding a lessor's right of distress upon goods on the demised lands (as to the effect of which, as between the lessor and other creditors, reference was made to the Statute 8 Anne, c. 14) abridged, because, without privity on his part, the lands had got into the occupation of a company against whom, when the distress was made, a winding-up petition had been presented. (b)

(a) *Supra*, p. 63.

(b) The following are the material sections of the Companies Act, 1862, which were referred to in the arguments:—

Sect. 84. "A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

Sect. 85. "The Court may at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any

* 379 *THE LORD JUSTICE KNIGHT BRUCE.—The proposition for which the appellant contends is unreasonable and unjust: nor is there any thing in the Act rendering it incumbent upon the Court to say, when a distress has been put in force before the making of the winding-up order, that the company was then being wound up within the meaning of the 163d section.

THE LORD JUSTICE TURNER.—I also concur in the decision of the Master of the Rolls. I think the 163d section of the Act must be construed as only avoiding attachments, sequestrations, distresses, or executions when leave to put them in force has not been given under the 87th section.

.Appeal dismissed.

action, suit, or proceeding against the company, upon such terms as the Court thinks fit; the Court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company."

Sect. 87. "When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

Sect. 163. "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."

* McANDREW v. BASSETT.

* 380

1864. May 7. Before the Lord Chancellor Lord WESTBURY.

An element in the right to property in a trade-mark is the fact of the article to which the stamp or mark is affixed being in the market as a vendible article with the stamp or mark at the time when it is imitated.

The essential ingredients for constituting an infringement of a right to a trade-mark are — (1) that the mark has been applied by the plaintiffs properly, *i.e.*, that they have not copied any other person's mark, and that the mark does not involve any false representation;¹ (2) that the article so marked is actually a vendible article in the market;² (3) that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description.³ *Semble.*

Although where a word is chosen as a trade-mark which is in fact a geographical designation of a whole tract of country, where the raw material is grown whence a manufactured article is produced, there cannot be property in the word for all purposes, yet property in the word, as applied by way of stamp upon a particular vendible article, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality or of some other circumstance which renders the article so stamped acceptable to the public.⁴

THIS was an appeal by the defendants George Bassett and Samuel Meggett Johnson, who carried on the business of wholesale confectioners at Sheffield in copartnership under the firm of Bassett & Company, from an order made by the Vice-Chancellor WOOD on the hearing of a motion for decree.

By the order under appeal his Honor granted with costs and with ancillary relief a perpetual injunction to restrain the appellants, their agents and servants, from stamping, impressing, branding, or marking, or causing or permitting to be stamped, impressed, branded, or marked upon, any liquorice manufactured or prepared by or for them, or bought, procured, or sold by them, the word

¹ See *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J. & S. 137 and note (3); 2 Dan. Ch. Pr. (4th Am. ed.) 1649; *Marshall v. Ross*, L. R. 8 Eq. 651; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345.

² See *Candee v. Deere*, 54 Ill. 439.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 1649, and cases in note (3); *Burgess v. Burgess*, 3 De G., M. & G. 896, and cases in note (1); 1 Joice Inj. 313, 314, 348, 349.

⁴ See 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649.

“Anatolia,” or any other word only colourably differing from such word; and also from selling or offering for sale, exporting, consigning, or otherwise disposing of any liquorice in sticks or other forms having or bearing thereon, or marked or stamped with, the word “Anatolia,” and not being of the plaintiffs’ manufacture;

and also from selling or offering for sale any liquorice or
 * 381 preparation * of liquorice under such name, or in such form or manner (not being of the plaintiffs’ manufacture) as to represent or lead to the belief that the same had been manufactured by the plaintiffs, who were the respondents in the suit.

The facts of the case, as also the scope of the arguments, sufficiently appear from the Lord Chancellor’s judgment. A letter of the 13th of September, 1861, which is referred to in that judgment, was written to the respondents by their London agent, and was, omitting formal parts, as follows:—

“5 Jewin Crescent, E.C., Sept. 13, 1861.

“Messrs. Bassett & Co.

“Please send to Thos. & Edward Voile, wholesale druggists, 35 Skinner Street, Euston Road, N.W.,

5½ cwt. cases Spanish juice as sample you sent to us . 65s.

5½ cwt. cases to be made of the same juice, but 14 to the lb., stamped “Anatolia,” as the accompanying sample 65s.

“Each case to be marked with the name and the net weight outside.

| | |
|---|--------|
| 1 chest about 1 cwt. 1 qr., 7 lb. boxes | } 65s. |
| 1 „ „ 1 cwt. 1 qr., 14 lb. boxes | |
| 10 inch juice not longer or shorter | |

“These are large buyers, and this is only a sample order—much wanted.”

Mr. Rolt and *Mr. Dundas Gardiner* appeared for the respondents; and

Sir Hugh Cairns and *Mr. A. G. Marten*, for the appellants.

* 382 * The authorities referred to were the following, viz.:—

On the part of the respondents : —

Perry v. Truefitt, (a) Gout v. Aleploglu, (b) The Leather Cloth Company, Limited v. The American Leather Cloth Company, Limited, (c) and (as to the costs of the suit) *Edelsten v. Edelsten. (d)*

On the part of the appellants : —

Hall v. Barrows, (e) Sykes v. Sykes, (g) Dawson v. The Bank of London, (h) Lloyd on Trade-Marks. (i)

THE LORD CHANCELLOR. — The plaintiffs are large manufacturers of liquorice. They appear to have completed their manufactory some time in the month of July, 1861, and they immediately began to manufacture liquorice upon a large scale.

In the month of August, 1861, they sent to be warehoused in London a large quantity of a certain kind of liquorice which they had stamped with the word *Anatolia* as a distinguishing mark of a particular kind, and by way of contradistinction from other kinds of liquorice.

At some time in August (the exact date does not appear), a case of that liquorice so stamped, containing a considerable quantity, was delivered by the warehouseman to a certain trading firm of Johnston & Son. By this firm it would appear to have been distributed among retail dealers. That is a fact not directly proved, but it * is to be immediately inferred from what is * 383 proved ; for it appears by a letter of the 13th of September, 1861, produced by the defendants, that certain druggists in Skinner Street, Euston Road, Messrs. Thomas & Edward Voile, were then possessed as of vendible articles of part of the liquorice marked with the word *Anatolia*. It is stated on the part of the defendants by one of the Messrs. Voile that his firm obtained that liquorice from a person of the name of Edwards, a fruit dealer. Edwards makes no affidavit, and as there has been no attempt on the part of the defendants to show that there was at this time in the market any other manufacturer of liquorice stamping it with the word *Anatolia* besides the plaintiffs, I must infer that the articles which Messrs. Voile had for sale were articles of the plaintiffs' manufacture.

(a) 6 Beav. 66.

(b) 6 Beav. 69.

(c) *Supra*, p. 137.

(d) 1 De G., J. & S. 185.

(e) *Supra*, p. 150.

(g) 3 B. & C. 541.

(h) 18 C. B. 84.

(i) Page 86.

On the 13th of September an order was sent to the defendants for five and a-half hundred-weight of this description of liquorice, and the order contained an express direction that the liquorice should be stamped Anatolia, and part of the goods manufactured by the plaintiffs was sent with the letter to the defendants as a sample. The letter did not stop there; it concluded in these words: "These are large buyers, and this is only a sample order — much wanted."

From that letter I must infer that the article had become known in the market, and that the person who gave the defendants the order anticipated that much more would be required.

Upon receiving that order, it appears that the defendants immediately caused a stamp to be prepared, for the purpose of exactly imitating the stamp on the article sent to them, and that * 384 they continued to use that stamp, substituting * it for the stamps that they had previously used in their manufacture. There can be no doubt therefore that, whether knowingly or not, they became imitators of the article sent to them; there can be no doubt that their desire was that their goods so manufactured should for the future be received in the market upon the footing of that sample article which had been sent to them.

It has been much pressed upon me on behalf of the defendants that I ought to declare that sufficient time had not elapsed between the termination of the month of July and the 13th of September following for the plaintiffs to acquire a right of property in this particular trade-mark. The substance of the argument on the part of the defendants is this: that assuming the Court to interfere upon the ground of property in a trade-mark, that property must be regarded as the offspring of such an antecedent user as will be sufficient to have acquired for the article stamped general notoriety and reputation in the market, and that the property cannot be held to exist until the fact of that general user, that notoriety, and that public reputation has been proved to exist.

I am not in this case driven to the necessity of determining when for the first time property may be said to be established in a trade-mark. An element of the right to that property may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably would be found

to be no other than these : first, that the mark has been applied by the plaintiffs properly (that is to say), that they have not copied any other person's mark, and that the mark does not involve any false representation ; * secondly, that the * 385 article so marked is actually a vendible article in the market ; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description.

All those ingredients, all those requisites, are to be found in the case before me.

The letter of the 13th of September abundantly proves that the plaintiffs' manufacture was known in and was upon the market. The letter of the 13th of September is pregnant with proof that that manufacture was accepted in the market as an improved manufacture, and was an article likely to be in demand. The letter of the 13th of September is abundant proof that, with knowledge of these facts, the defendants imitated the mark. The letter of the 18th of September is proof that they imitated the mark in order that their own manufacture, stamped with the mark, might come into the market, and plainly, as they must have known, for the purpose of competing with the article so marked which previously was there. The fact of the adoption of the stamp by the defendants is itself pregnant with proof of their estimate of the desirableness of so stamping their liquorice ; and they thenceforth used the adopted stamp in the place of those which they had previously used. Their reason for so doing is clearly to be collected from the letter which led them to adopt it.

It is impossible to say that a case so circumstanced has not all the elements of a case which requires the interposition of this Court. There is the deliberate imitation of a mark previously existing in the market. The thing is done in order that the rival article of the defendants' manufacture may be brought into the market * in competition with that which is already there. * 386 . There is nothing, in a word, which is necessary for the interposition of the Court which is wanting on the present occasion.

But — it is urged on behalf of the defendants — this word *Anatolia* is a general expression ; is, in point of fact, the geographical designation of a whole tract of country wherein liquorice-root is largely grown, and is therefore a word common to all, and in it there can be no property.

That argument is merely a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in that word, as applied by way of stamp upon a particular vendible article, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public.

Lastly, it is urged on behalf of the defendants with respect to the costs of this suit, that they were unwilling to contest the right of the plaintiffs.

When they imitated the mark they knew that there was that mark in use, and they intentionally imitated it. It is probable that at the time they were not aware that it was the mark of the plaintiffs. But if a man finds an article sent to him from the market bearing a particular stamp, and he intentionally appropriates that stamp, and thenceforth uses it for the purpose of designating his own article, laying aside the mark that he had previously used, and appropriating that which he ought to have
* 387 *inferred was the property of another, he must take the consequences. If upon the first notification of their having done wrong to the plaintiffs, the defendants had offered to give up the practice, had entered into an engagement for that purpose, and had not contested the plaintiffs' right, the question of the defendants being liable to the costs of the suit would have deserved much consideration. But upon being served with notice of the plaintiffs' right, and of the fact of the imitation of it on the part of the defendants, the course that the latter thought proper to take was to come into Court and contest the plaintiffs' title to its interposition in their favour. The defendants have failed in their contention, and the usual result must follow.

The learned Vice-Chancellor's conclusion was in my judgment correct, and the appeal must be dismissed, with costs.

* BAKER v. MONK.

* 388

1864. May 7. Before the LORDS JUSTICES.

A small freehold property was agreed to be sold by an elderly spinster in humble life, to a person far above her in station. The agreement was come to between the parties alone. In respect of the consideration the vendor sought and obtained a slight advance on that offered by the purchaser. The purchaser's solicitor drew the conveyance, and it was presented to the vendor ready for execution, and executed by her without any advice. The Master of the Rolls having set aside the conveyance: *Held*, that his decree was right,¹ because —

Per the Lord Justice KNIGHT BRUCE: The parties to the contract were in such relative positions that (a case of undervalue being on the evidence affirmatively deposed to) it lay on the purchaser (contrary to the usual rule) to show affirmatively that the price he had given was the value, and on the evidence he had failed in doing so.

Per the Lord Justice TURNER: There was such a difference between the position of the parties to the contract as rendered it incumbent on the purchaser to throw further protection round the vendor before he made the bargain with her, and the contract was an improvident one from which she was entitled to be relieved (approving and following *Evans v. Llewellyn*, 1 Cox, 333²).

Per the Lord Justice KNIGHT BRUCE: The circumstance standing alone of the vendor being acquainted with the value of the property might amount to nothing or next to nothing.

Per the Lord Justice TURNER: In ascertaining, in a case of disputed sale, the value of land with dilapidated cottages on it, the rent which the cottages would produce is not the only element to be considered; the value of the site at the time of the sale must also be considered.

THIS was an appeal by the defendant from a decision of the Master of the Rolls, whereby in effect his Honor set aside a conveyance of certain property at Faversham, in Kent, executed by the respondent, the plaintiff in the suit, in favour of the appellant, on the grounds of want of adequate consideration and inequality in the position of the parties.

The case in the Court below is reported in the 33d Volume of Mr. Beavan's Reports, (a) and from that report, as also from the judgments of the Lords Justices, the facts sufficiently appear.

(a) Page 419.

¹ See *Clark v. Malpas*, 4 De G., F. & J. 401, and cases in note (1).

² See *Kerr F. & M.* (1st Am. ed.) 143, 144; 1 *Sugden V. & P.* (8th Am. ed.) 275 and cases in notes; *Harrison v. Guest*, 6 De G., M. & G. 424, and cases in notes; 2 *Dart V. & P.* (4th Eng. ed.) 683-686.

Mr. Jessel and *Mr. Herbert Smith* appeared for the respondent, and

* 389 * *Mr. Selwyn* and *Mr. Hardy*, for the appellant.

Reference was made to *Clark v. Malpas*, (a) *Harrison v. Guest*, (b) *Wood v. Abrey*. (c)

THE LORD JUSTICE KNIGHT BRUCE. — The bill in this suit contains, in my judgment, as also I believe in that of the Lord Justice, exaggerations and some inaccurate statements, and much which might have been omitted; but the question is, whether, after making proper deduction for all this, there does not remain enough in the allegations, supported by the evidence, to justify the Court in giving to the respondent the relief which she asks. Whether upon the whole it might not have been better for the respondent personally in point of comfort and ease to remain contented with matters as they stood rather than contest them, is not now the question. The question is as to her title to contest the transaction if so disposed, and the suit having been instituted, we have only to decide that question according to the principles and rules by which this jurisdiction is directed, and, as I think, for the general good of society.

This is a case in which society is as much interested as are individuals. It is the case of a purchase of real estate belonging to an elderly woman in humble life, consisting of ground in a town in Kent, and rather a prosperous town than otherwise, occupied at present by some old buildings considerably out of repair and frequently wanting reparation. The respondent appears

* 390 * to have had some wish to be rid of the trouble and expense of the repair, and to have instead a certain annuity for her life. Thereupon she mentioned the subject, and it came to the knowledge of the minister of the congregation to which she belongs, and he — probably with every good intention — spoke upon the subject to a substantial tradesman in the town, who was in such a good station in life that he had been once or twice mayor; and he, in consequence of the communication made to

(a) 31 Beav. 80; S. C. on appeal, 4 De G., F. & J. 401.

(b) 6 De G., M. & G. 424; S. C. on appeal, 8 H. L. Cas. 481.

(c) 3 Madd. 417.

him, went to the respondent about it. There was a little chaffering between them, but it was ultimately arranged that he should have the property in fee-simple subject to a right to the respondent, during the period of her father-in-law's life, to occupy a cottage, and the appellant was to have the property in fee-simple for a certain payment per week.

The question is not merely or alone whether this lady was or was not acquainted with the value of the property. That circumstance standing alone might amount to nothing, or next to nothing. But the question is, whether — to repeat an expression used in several cases — the parties to the transaction were on equal terms. The purchaser was a substantial tradesman in the town in the station of life which I have mentioned. The vendor was a single woman in humble life, of slender education, between sixty and seventy years of age, unprotected and unaided. After some little chaffering, as I have said, she consented to accept this weekly payment during her life as the purchase-money of the fee-simple subject to another qualification which is so slight that it is not necessary to mention it further. This transaction takes place between this gentleman and this poor woman without the intervention on her part of any other person. She was, as I have said, wholly unassisted, unadvised, and unaided; but he placed the matter in the hands of his lawyer. * The lawyer drew * 391 the instrument — I dare say with good intentions — without consulting any other person, and brought the document to the respondent for execution, and she executed it under his advice alone. The deed is in one respect at least framed not with sufficient attention to the interests of the vendor, although, as I have said, probably with no wrong intention. The transaction was thus begun and ended without any advice on her behalf. The purchase was wholly completed by the purchaser, who was in that station of life which I have mentioned, and his lawyer.

The purchaser and vendor were in such relative positions as that, according to the known established doctrine of this Court, it lies on the purchaser to show affirmatively that the price he has given is the value.

In my judgment this he has failed to do. Without saying that I adopt exactly any of the values which have been given, I am clearly satisfied on the evidence that this property at the time of the sale was worth more than 250*l.*; and regard being had to the

fact of the respondent being some sixty-seven years of age and in not very good health, she ought to have had more than the 23*l.* 8*s.* a-year, which she has had for this property with the addition to that of the enjoyment of one of the houses during her father-in-law's life, — a stipulation which, considering his age, amounted to little or nothing.

In my judgment, therefore, this is a case of undervalue affirmatively established, the circumstances of which, according to the established doctrines of this Court, make it incumbent on the purchaser, contrary to the ordinary rule, to show that he has given the full value to the unadvised and unassisted vendor. I

think that the purchaser fails in doing this ; that the trans-
 * 392 action * ought not to have taken place under the circumstances in which it did take place, and the decree of the Master of the Rolls is right.

THE LORD JUSTICE TURNER. — I agree with my learned brother in the conclusion to which he has come, and also in the view of the facts which he has taken.

The principles of law applicable to the case are well known. I have always looked upon the case of *Evans v. Llewellyn* (a) as laying down the true principle on which the Court acts in cases of purchases of this description. In that case the then Master of the Rolls makes this observation, (b) “ I am called upon for principles upon which I decide this case ; but where there are many members of a case, it is not always easy to lay down a principle upon which to rely. However, here I say, that the party was taken by surprise ; he had not sufficient time to act with caution ; and, therefore, though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation.” Then he refers to the cases of infants dealing with guardians and other cases of that description, and he goes on to say, “ I do not know that the Court has drawn any line in this case, or said thus far we will go and no further ; it is sufficient for me to see that the party had not the protection he ought to have had, and therefore, the Court will harrow up the agreement. I am of opinion, in this case, the party was not competent to protect himself, and therefore this Court is bound to afford him such protection, and therefore these

(a) 1 Cox, 333.

(b) 1 Cox, 340.

deeds ought to be set aside as being improvidently obtained." Upon those principles I am content to rest this case.

* Here is a transaction between an old woman (and I * 393 will say no more than that), said to be a very shrewd old woman, but still an old woman, dealing with a person far superior to her in position, there being no advice given to her and no assistance rendered to her in the course of the treaty for the purchase and agreement for sale of the fee-simple of the property for an annuity of 9s. a week, to last during the life of this old lady, who could know no more about what the pecuniary value of that annuity was than any person whom you might meet walking along the streets at the time.

I think there was that distinction between the parties which rendered it incumbent on the appellant to throw further protection around this lady before he made the bargain with her.

Again, if the case depended on the evidence of valuers, the appellant's evidence has not satisfied my mind that the true value was given; for that evidence regards this property solely in the light of the question what the cottages would let for, without any reference to the future value of the property if the cottages were pulled down and it was then sold. I cannot agree with the argument which has been pressed upon us on behalf of the appellant, that it would be right in a transaction of this description simply to look at one element, namely, the rent which these old cottages would produce, and disregard the other element, — and a very material element, — the value of the site on which the cottages stood at the time when the transaction in question took place.

I think that the deed cannot stand. I say nothing about improper conduct on the part of the appellant; I do not wish to enter into the question of conduct. In cases of this description there is usually exaggeration on * both sides, and I am * 394 content to believe that in this case there has been no actual moral fraud on the part of the appellant in the transaction; but, for all that, in my judgment an improvident contract has been entered into. An intending purchaser comes to an old lady and makes a bargain; nothing more is heard until about fourteen days have elapsed, and then the deed is brought to her ready prepared, and she is called upon to execute without having an opportunity of examining it.

The case is not, I think, at all affected by *Harrison v. Guest*. (a) In that case there had been no advantage, nothing which could be regarded as an advantage, taken by Mr. Guest. The Lord Chancellor in that case, when it was before the House of Lords, after remarking that the offer came in the first instance from the vendor to the purchaser, continues, (b) "Instead of its being snapped at by Mr. Guest, he goes to Scarborough and tells Hunt that he had better take time to consider it. It was finally agreed between them, and I think quite deliberately." There had been in *Harrison v. Guest* a previous offer made to some one else, and when the vendor made his offer to Mr. Guest the latter did not conclude the matter at the price named, but he said in effect, "I advise you to consult some one else about it."

But here there is no such advice, nor indeed is any advice at all given to this woman. The purchaser does not say, "You had better not sell it to me without consulting some one else."

I think that it was his duty to give that advice, that the decree of the Master of the Rolls is right, and that this appeal should be dismissed, with costs.

1864. April 27, 28. May 9, 23. Before the LORDS JUSTICES.

On the marriage of a lady, who was entitled under her father's will to an interest in his residuary estate and two sums of cash in reversion expectant on her mother's death or marriage, and to no other property, a settlement was executed whereby the intended husband and wife covenanted that if at any time during the life of the lady any real or personal estate should be given or devised, descend or devolve, be bequeathed or come to her or her husband in her right, it should be settled. The property was to be held by the trustee upon trust to pay the income to the wife or her appointees, to the intent that the same might be and remain a separate personal and inalienable provision for the wife during the coverture: and upon further trust to pay, assign, or otherwise dispose of the same from time to time to the wife's appointees by deed or will: *Held*, —

1. That the reversionary interests of the wife were bound by the covenant.

(a) 6 De G., M. & G. 424; S. C., 8 H. L. Cas. 481.

(b) 8 H. L. Cas. 492.

2. That the wife could not during the coverture affect against herself by way of anticipation any portion of the income arising from them.¹

The reversionary interests in question, whilst still reversionary, were assigned by the wife by deed duly acknowledged to the trustee of the settlement by way of sale, he having been removed from his office by deed of even date; the consideration was in fact in part made up of advances made by him to the husband. The wife received no explanation of her rights when she executed the assignment: *Held*, that the sale must be set aside.²

To what extent the trustee was entitled to a charge on the wife's reversion expectant on the coverture in respect of moneys advanced by him to her or to her husband with her consent or by her direction. *Quære*.³

THIS was an appeal by the defendant James Pride from a decree made by Vice-Chancellor Wood.

The suit was instituted by the respondent Susan Spring, the wife of the respondent George Spring, by her next friend, as plaintiff, against the appellant (who was her brother) Daniel Baker (who was her first cousin) and the respondent George Spring, as defendants.

It extended to various questions between the appellant and the defendant Daniel Baker, which did not arise on the appeal, and to which consequently it is not necessary to refer.

* To explain the matters referred to in the judgments of * 396 the Lords Justices, the following statement of the facts is sufficient: —

In May, 1852, the respondent Susan Spring was entitled, under her father's will, to one-sixth part of his residuary real and personal estate, and also to one-fourth part of two sums of 500*l.* and 200*l.* devised and bequeathed by the will, subject to an interest of her mother therein determinable on her death or marriage.

On the 20th of May, 1852, an indenture of settlement of that date was executed, and was expressed to be made between the respondent George Spring, of the first part; the respondent Susan Spring, then Susan Pride, spinster, of the second part; and the appellant, of the third part.

¹ See *Lewin Trusts* (5th Eng. ed.), 554; *D'Oechsner v. Scott*, 24 Beav. 239.

² See 2 Sugden V. & P. (8th Am. ed.) 687, n. (a), 692 and n. (b), 693, n. (c¹); *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Kerr F. & M.* (1st Am. ed.) 154. As to sales of reversionary interests, see *Edwards v. Burt*, 2 De G., M. & G. 55, note (1); *Perfect v. Lane*, 3 De G., F. & J. 369, note (1); 1 Sugden V. & P. (8th Am. ed.) 276 and note (k).

³ See *Earl of Aldborough v. Trye*, 7 Cl. & Fin. (Am. ed.) 436, and cases in note (3).

It recited that a marriage was intended to be shortly solemnized between the respondents George Spring and Susan Spring, and that it had been agreed that the parties should enter into the covenant therein after contained.

It then witnessed that the respondents George Spring and Susan Spring covenanted with the appellant, his heirs and assigns, that if at any time during the life of the respondent Susan Spring any real or personal estate should be given or devised, descend or devolve, be bequeathed or come to her or to the respondent George Spring in her right, then and so often as the same should happen he and she and their heirs would make, do, and execute, or cause to be made, done, and executed, all such acts, deeds, assignments, and assurances in the law as the appellant, his heirs, or * 397 assigns, should * think proper and necessary for effectually conveying and assuring such real estate, and for effectually vesting such personal estate to the uses, intents, and purposes after declared, to hold the said real and personal estate unto the appellant, his heirs, executors, administrators, or assigns, upon trusts for sale and conversion and investment of the proceeds, and any variations of investments were to be made with the consent of the respondent Susan Spring during her life.

The indenture then proceeded to declare that the trustee for the time being should stand and be possessed of the said real and personal estate upon trust to pay the issues and profits thereof, dividends, interests, and annual income, as the same should become due and be received, into the proper hands of the respondent Susan Spring, or to such person or persons as she, notwithstanding the intended coverture, should by note or writing direct or appoint, to the intent that the same might be and remain a separate personal and inalienable provision for her during the said intended coverture, and might not be subject to the debts, control, disposition, or engagements of the respondent George Spring, and that the receipt of the respondent Susan Spring, or of such person or persons as she should from time to time appoint in manner aforesaid, and such receipt alone should be a sufficient acquittance and discharge to the said trustee for so much of the said issues, profits, dividends, interest, and annual income as should therein be acknowledged or expressed to be received; and upon further trust to pay, assign, or otherwise dispose of the same from time to time to such person or persons, for such intents and purposes

and in such manner as the respondent Susan Spring, notwithstanding her intended coverture, by any deed or deeds or by her last will and testament should direct, limit, or appoint.

* The indenture contained the usual power to the trustee * 398 to give receipts and a power to appoint a new trustee.

The interests of the respondent Susan Spring under her father's will above referred to constituted the only property which she had at the date of the settlement.

On the 19th of April, 1859, three deeds of that date were executed by the respondents Susan Spring and George Spring at the office of the solicitor of the appellant and without independent advice on their part, and, as the bill alleged, on the requisitions of the appellant and the defendant Daniel Baker, under whose control the respondents alleged themselves to have been at the time.

By the first two deeds the defendant Daniel Baker was substituted for the appellant as a trustee of the settlement, and the trust estate subject to, and the covenant with the trustee contained in, the settlement were assigned to the defendant Daniel Baker as such new trustee.

By the third deed, which was duly acknowledged by the respondent Susan Spring, her share and interest under her father's will were conveyed and assigned to the appellant for his own use.

The consideration stated in this third deed was a sum of 952*l.* 15*s.* expressed to have been that day paid.

The bill charged that such sum was not so paid, and was in fact as to 852*l.* 15*s.* made up of advances and previous payments to or for the respondent George Spring, with interest on such advances and payments, * and that nothing was paid to the * 399 respondent Susan Spring; but that the sum of 100*l.*, and that sum only, was paid on the execution of the deed to the defendant Daniel Baker, and that such sum, as to the whole or the greater part thereof, had been similarly paid or applied to or for the respondent George Spring.

It was alleged by the appellant that these three deeds of the 19th of April, 1859, were executed in pursuance of an agreement between the parties, signed on the 11th of January previous. The respondent Susan Spring, however, charged that this agreement was executed by her at the request of the appellant and the defendant Daniel Baker, and without professional advice.

Sarah Pride, the mother of the respondent Susan Spring, died on the 26th of April, 1859.

The object of the suit was to set aside this transaction ; and by the decree under appeal, the Vice-Chancellor did so, with costs up to the hearing as against the appellant and the defendant Daniel Baker ; but his Honor being of opinion that the interests of the respondent Susan Spring under her father's will were bound by the settlement of 1859, and that by the terms of that settlement she was precluded from anticipating or charging the income arising from those interests during the coverture, but that she was not thereby precluded from charging the *corpus* after the cesser of the coverture, directed an account of her share of the personal estate and of the rents and profits of the real estate under her father's will come to the hands of the appellant, and an account of the moneys advanced by the appellant to her or by her sole direction ; directed that her remainder in such property expectant upon * 400 the coverture should be charged * with what upon the balance of accounts should be found due to the appellant ; and reserved further consideration and subsequent costs.

Mr. Rolt and *Mr. A. G. Marten*, for the appellant.— This reversionary property of the respondent Susan Spring was a vested interest in her at the date of the settlement. It was not settled expressly by the settlement of May, 1859, and it cannot be taken to be settled by implication by reason of the covenant contained in that settlement. The respondents George Spring and Susan Spring were consequently able to sell the property to the appellant, and that is all that has been done. Even assuming that the property was comprised in the settlement, still by the express language of that settlement it was to be paid, assigned, or otherwise disposed of from time to time to such person or persons, for such intents and purposes, and in such manner as the respondent Susan Spring, notwithstanding her intended coverture, by any deed or deeds or by will should appoint ; which provision disposes of any argument on the ground of inalienability which might be sought to be deduced from the earlier clause of the settlement. Even on this assumption, therefore, the appellant's title is good ; for the respondent Susan Spring has by deed assigned the property to him. And it cannot be successfully argued that the purchase was one by a trustee from his *cestui que trust* ; for

the trusteeship was nominal. The trust property was a reversionary interest, which did not fall into possession until after the sale and purchase were completed, so that at the time of the transaction in question the appellant was trustee of nothing. At any rate, the respondent Susan Spring had a power of dealing with the *corpus* of the settled property expectant on the determination of the coverture; and in the events *which have *401 happened the appellant is entitled to a charge on that reversion in respect of his advances to the respondent George Spring by the direction or with the consent of the respondent Susan Spring.

They referred to *Archer v. Kelly*, (a) *Brooks v. Keith*, (b) *Wilton v. Colvin*, (c) *Hoare v. Hornby*, (d) *Otter v. Melvill*, (e) *Alexander v. Young*, (g) *Sutton v. Jones*, (h) *Naylor v. Winch*, (i) *King v. Hamlet*, (k) *Talbot v. Staniforth*, (l) *Perfect v. Lane*. (m)

THE LORD JUSTICE KNIGHT BRUCE. — Upon two or three points in this case I think we may, without impropriety and with convenience and advantage, at once give our judgment, that judgment being upon those points in accordance with the view taken by the Vice-Chancellor.

The marriage settlement of this unlucky lady is no doubt strangely and untechnically framed, but the question is not whether it is agreeable to grammar and correct in form, but what is the intention to be fairly and reasonably collected from the whole document.

And so collecting the intention of the parties from it, so far as that intention can be collected from it, we see that this lady at the time of the settlement was entitled *to reversionary *402 property real and personal under the will of her father, — reversionary because her mother had an interest in it determinable on her death or marriage. There is no evidence that this lady had any other property whatever, and we find in the settlement

(a) 1 Dr. & Sm. 300.

(b) 1 Dr. & Sm. 462.

(c) 3 Drew. 617.

(d) 2 Y. & C. C. C. 121.

(e) 2 De G. & Sm. 257.

(g) 6 Hare, 398.

(h) 15 Ves. 584.

(i) 1 S. & S. 555.

(k) 2 Myl. & K. 456.

(l) 1 J. & H. 484.

(m) 3 De G., F. & J. 369.

(amongst other words pointing, according to the strict interpretation and proper use of language, to a future will or future disposition) the words “devolve” and “come to,” which are words not inaccurately applicable to the falling into possession and enjoyment of a reversionary property then belonging to that person in expectancy; and in my judgment, according to the true interpretation of this instrument, it was meant to extend and did extend to her share of reversionary property under her father’s will expectant upon her mother’s life or widowhood interest.

Pursuing the trusts of this very remarkable instrument, we find inalienability referred to in a certain way, but in company with such other words and such expressions as to render the argument not wholly unreasonable, that, notwithstanding the word “inalienable,” this lady was to have the absolute power over the property, so as in effect to enable her to defeat the settlement by giving the whole over to her husband. I think, however, that there is not enough in the settlement to defeat the plain meaning of the word “inalienable,” and in my judgment the true interpretation of the settlement is, that during the coverture — during the time as yet existing during which both the husband and the wife are living — the whole income (and I am now only speaking of income, and in no way referring to what may become of the capital after the death of either the husband or the wife) of the property was to be for her separate use without power of anticipation, and
 * 403 therefore in that sense inalienable, * and that she has hitherto been and now is powerless to affect against herself by way of anticipation any part of the income that has accrued due since the marriage, or that shall accrue due during the joint lives of herself and her husband, that is, during the coverture.

The third of the points to which I have referred is as to the validity of the sale to the appellant, who was a trustee of the settlement, and who was only colourably removed from the trusteeship for the purpose of enabling a sale with more convenience, or with a better appearance, to be effected.

It is said that he was a trustee of nothing, because nothing could be enjoyed under the settlement until the mother should have died or married again. But arrangements might have been made with the mother, by which the trustee under the settlement might have been called into activity, and interference on his part have become necessary. At all events, he was a trustee of it; and I think his

position as a trustee was effective. Even had he not been a trustee, there are circumstances enough in evidence here to satisfy me perfectly that this sale to the appellant as a sale was as bad a sale as ever was heard of in this Court, and that it cannot stand for a moment.

What may be the rights of the appellant in respect of advances — otherwise than in respect of a sale — is a question upon which I do not at present say any thing.

THE LORD JUSTICE TURNER. — I also agree with the decision of the Vice-Chancellor upon these three points.

* In the first place, I think the reversionary property is * 404 included in the settlement. The language of the settlement is sufficient to embrace it under the words “devolve or come to.” The objects and purpose were to secure the property of this lady for the purposes of the settlement; and I think we ought not to put a restricted construction upon these words, there being no evidence and nothing which appears upon the face of the settlement which tends to indicate that any such restriction was intended.

As to the second point, no doubt the settlement is one difficult to understand. It declared the trusts of the property to be to the intent that the same might be and remain a separate personal and inalienable provision for the wife during her then intended coverture, and then a further trust was declared that it was to be paid, assigned, or otherwise disposed of from time to time to such person or persons, for such intents and purposes, and in such manner as the wife, notwithstanding her intended coverture, by any deed or deeds, or by her last will and testament in writing, should direct, limit, or appoint. It is evident that if the power of appointment is to receive the extended construction which is contended for on the part of the appellant, this settlement might just as well never have been made at all. For the very day after its execution the wife might have made an appointment taking the whole of the property out of the trustee. There can, as it seems to me, be only one construction put upon the words “upon further trust;” namely, that they mean “subject to the trusts aforesaid,” that is to say, that subject to the trust for her inalienable use during the coverture, the property shall belong to her appointees by deed or will, the power of appointment extending merely to the reversion expectant

on the determination of the interest reserved to the wife during the coverture.

* 405 * Then, upon the question whether the sale is to stand, I entirely agree with my learned brother, that it is impossible. The sale is one of the most untenable sales that has ever appeared in this Court as between a trustee and his *cestui que trust*. It is said that this gentleman was not in fact a trustee, because the property had not as yet come to him. But it is clear that he was a trustee for the purpose of any dealing as between him and the person interested under the settlement; and a dealing of this description, by which the moneys which have been advanced by him are to be taken in part payment of the purchase-money, seems to me to be utterly hopeless and untenable. Whatever rights the appellant may have had (and no doubt it seems difficult to understand them with precision), it does not appear that any sort of explanation was given to this lady of what the rights were which she might possess, although it does not appear difficult to explain what those rights are or will be. A transaction between trustee and *cestui que trust* cannot stand unless the latter is well advised of what his rights are.

My judgment upon these three points agrees with that of the Vice-Chancellor; but I say nothing whatever upon the question to what extent the appellant may be entitled to a charge on the reversion in respect of moneys which may have been advanced either to this lady or to her husband with her consent or by her direction.

Mr. W. M. James and *Mr. Gordon Whitbread*, for the respondent Susan Pride, and *Mr. Hallett*, for the respondent George Spring, accordingly argued the question as to which their Lordships had expressed no opinion; and *Mr. Marten* was heard in reply.

* 406 * At the conclusion of the arguments their Lordships reserved judgment, suggesting, however, to the parties the propriety of a compromise on this point.

May 9.

On this day an order was made by consent, giving effect by declaration to the decision of their Lordships on the points of construction, and setting aside the sale to the appellant on the terms

of the respondent Susan Spring giving him a charge on her reversionary interest expectant on the coverture for half the amount of the alleged advances without interest, with consequential directions.

* In the Matter of The JOINT-STOCK COMPANIES * 407
WINDING-UP ACTS, 1848, 1849; and

In the Matter of The JOINT-STOCK COMPANIES WINDING-UP AMENDMENT ACT, 1857; and

In the Matter of The BRITISH PROVIDENT LIFE AND FIRE ASSURANCE SOCIETY.

STANLEY'S CASE.

1864. June 2. Before the LORDS JUSTICES.

The deed of settlement of a joint-stock company authorized the directors to borrow at interest on the security of the funds or property of the company moneys not exceeding in amount a moiety of the capital subscribed for at the time of the loan, and to cause the funds or property on the security of which any sum or sums should be borrowed to be respectively assigned, transferred, conveyed, or surrendered, as the case might require, by way of mortgage to the lender. The directors having issued a debenture assigning to a lender (who was not a shareholder of the company), as his security, all and singular the capital stock, moneys, securities for money, estate, and effects of the company whatsoever and wheresoever, and whether in hand or afloat, and the company being afterwards wound up: *Held*, —

1. That the debenture did not extend to unpaid capital of the company.¹
2. That he had no priority over the other general creditors of the company.

THIS was an appeal by Thomas Stanley, the only debenture holder creditor of the British Provident Life and Fire Assurance Society who was not also a shareholder, from the dismissal by Vice-Chancellor KINDERSLEY in Chambers, without costs of a summons taken out by the appellant in the winding up of the society.

¹ See 1 Lindley Partn. (3d Eng. ed.) 285 and n. (o). Calls actually made (Gibbs and West's Case, L. R. 10 Eq. 312; Sankey Brook Coal Co., No. 2, ib. 381), and calls actually determined to be made, although not actually made (Sankey Brook Coal Co., No. 1, L. R. 9 Eq. 721), may be mortgaged.

The summons in question sought an order upon the official manager, out of any moneys which had come to his hands on account of the society, to pay the appellant forthwith, and in priority to any other claim, the principal due to him on his debentures, and interest and costs of proof, and the costs of the application, and that all other necessary directions might
* 408 be given for the appropriation * of the assets, funds, and property of the company existing at the date of the winding-up order, and the unpaid capital of the company, in satisfaction of the debt of the appellant in priority to all other creditors of the society, excepting only such debenture holders, not being shareholders (if any), as might be entitled to rank equally with him.

The appellant's claim, as a general creditor of the society, had been allowed in the winding-up, and by the order now under appeal the allowance of such claim was directed not to be disturbed.

The question depended mainly upon the construction of the 174th, 220th, and 227th clauses of the deed of settlement of the society, and upon the forms of the debentures — which *mutatis mutandis* were in the same form — under which the appellant claimed.

Of the clauses of the deed of settlement just referred to, the 174th provided that all deeds sealed with the seal of the society, and signed by two or more of the directors thereof, should be binding upon the society, and should exonerate all other persons to or with whom the same should be made from being bound to take notice and from being affected by notice of the provisions of the deed of settlement.

The 220th clause empowered the directors to make calls if at any time any call or calls for any sum of money on shares then already allotted should appear to the directors for the time being to be necessary or expedient to be made.

The 227th clause provided, that it should be lawful for
* 409 the board of directors to borrow and take up at * interest on the security of the funds or property of the society, or any part thereof, or on open credit with their bankers, any sum or sums of money for the use of the society not exceeding in amount a moiety of the capital of the society subscribed for at the time such loan might be required, and to cause the funds or property on

the security of which any sum or sums should be so borrowed or taken up to be respectively assigned, transferred, conveyed, or surrendered, as the case might require, by way of mortgage, either with or without power of sale, to the person or persons for whom such sum or sums should have been borrowed or taken up.

The debentures under which the appellant claimed were respectively under the seal of the society countersigned by the manager, and under the hands and seals of two or more of the directors.

By them the executing directors, in their capacity of directors of the society, in board assembled, in consideration of the loan, and by virtue of the powers and authorities to them given and in them vested by the deed of settlement, assigned "all and singular the capital stock, moneys, securities for money, estate, and effects of the society whatsoever and wheresoever, and whether in hand or afloat," to the appellant as a security for the repayment of the loan on the expiration of three years from their date, together with interest; subject, however, to the earlier payment of principal money and interest (if any) due thereon at the times or upon the events therein mentioned.

The debentures then provided for payment of the interest until the principal was paid off by coupons or interest warrants annexed to the debentures, and empowered the society, on giving certain notices, to pay off * the whole of the unpaid part of * 410 the principal for the time being; and concluded in the following manner:—

"Provided always, that if at any time hereafter the interest on the said principal sum of" (naming it) "shall be in arrear and unpaid by the space of twenty-one days after the expiration of any of the days and times when the same should or ought to be paid, the same having been lawfully demanded, it shall be lawful for the said Thomas Stanley, his executors, administrators, and assigns, giving to the said society one calendar month's previous notice in writing, by leaving the same at the said office of the said society for the time being, to call for and require payment of such principal sum of" (naming it) "and the interest thereof as aforesaid. Provided always, and it is hereby declared and agreed notwithstanding any thing contained to the contrary, that in case the said society shall be merged into or amalgamated with any other assurance society or assurance company, or be dissolved under the

provisions of the deed of settlement thereof, or in case an order be made to wind up the said society under any of the statutes for the time being in force in relation to the winding up and dissolution of joint-stock companies, it shall be lawful for the said Thomas Stanley, his executors, administrators, and assigns, on giving to the said society one calendar month's previous notice in writing, and in manner aforesaid, to call for and require payment of such principal sum of " (naming it) " and the interest thereof as aforesaid. Provided also, that nothing herein contained shall have the effect of rendering the undersigned or any other director, officer, or proprietor of the said society personally liable to pay or to contribute towards the payment of the said principal sum and interest thereon beyond the amount of the unpaid portion of his,

her, or their share or shares in the subscribed capital stock * 411 of the said society, and outstanding * at the time whereat such payment shall be claimed. And that this debenture is and shall be subject and liable to the provisions of the deed of settlement of the said society so far as the same are or shall be applicable in the same manner as if the said provisions were repeated and incorporated herein. Provided also, that the said Thomas Stanley, his executors, administrators, and assigns, and all other persons to whom debentures shall be made by the said society or by the directors on their behalf, shall be entitled one with the other to the respective proportions of the said capital stock, moneys, estate, effects, and premises according to the respective sums in such debenture mentioned, without any preference by reason of priority of date of such debenture, or on any other account whatsoever."

Mr. Daniel and *Mr. Renshaw*, for the appellant. — The debentures were warranted in their terms by the provisions of the deed of settlement, and must be construed most strongly against the society, as the grantors in the deeds, and therefore to extend to capital not paid up. Indeed, it is most to the interest of the society, as borrowers, to enable them to make the best possible security, and therefore so to construe the debentures. The appellant's advance was *bonâ fide* made, and the effect of the debenture securities so construed would in no way tend to paralyze the society, because the extent of the borrowing power is limited by the 227th clause.

[THE LORD JUSTICE KNIGHT BRUCE. — Could the directors be compelled to make calls whether they thought they ought to be made or not?]

That is not the question. The question is, whether the documents were within the power of the directors to execute. We submit that they were, and that being so they bound the society.

[They referred on this point to *Lewis v. * Madocks* (a) * 412 and *Williams v. Thomas*. (b)]

At any rate the appellant is entitled to an inquiry as to what funds of the society existed at the date of the winding-up order, that being the period at which the property to answer these debenture securities should be ascertained; and upon that property he is a specific incumbrancer, and entitled to priority accordingly. *Re State Fire Insurance Company* (c) is not in point. But, in point of fact, the 174th section exonerated the appellant from all necessity of considering any thing beyond the terms of his security.

Mr. E. K. Karlake (*Mr. Baily* with him) for the official manager. — If these debentures extend to unpaid capital, they were *ultra vires*. But they do not; for the property which, by the 227th clause of the deed of settlement, may be given as the security is property which can be assigned, transferred, conveyed, or surrendered. This can only apply to property actually in existence, and cannot apply to unpaid calls, which, if a fund at all, are a fund which may never be called into existence. Even if it did so extend, the only way by which the incumbrancer could effectuate his security would be by getting a receiver, and the receiver could not exercise the functions of the directors and make calls. The appellant of course has his right against the society as a general creditor, as also he might institute proceedings to effectuate any security he may have on the property of the society; but as a general creditor he has no priority over the rest of the body of general creditors.

(a) 17 Ves. 49.

(c) 1 De G., J. & S. 634.

(b) 2 Dr. & Sm. 29.

* 413 * *Mr. Glasse* and *Mr. Shebbeare*, for the creditors' representative, followed the same line of argument, and referred to *The Era Company's Case*. (a)

Mr. Daniel, in reply, referred to *King v. Smith* (b) as *in pari materia*, and as showing that the existence of the debentures in question could in no way fetter the society.

THE LORD JUSTICE KNIGHT BRUCE. — However large and loose the language of the deed of settlement in this case, it must receive, so far as is possible, a reasonable construction, and, in my judgment, it could not upon any reasonable construction have authorized such documents as the debentures now before us. I agree that in several parts of the deed of settlement, — particularly in the 227th clause, which has been so much and so properly brought into the argument, — the language literally taken might at first sight seem to warrant such documents. But what is it that the instruments do? They assign by way of security “all and singular the capital stock, moneys, securities for money, estate, and effects of the society whatsoever and wheresoever, and whether in hand or afloat.” In my judgment, so to construe the deed of settlement as that it should warrant such an assignment as that would be to authorize a plain breach of trust and an act inconsistent with the continuance of this society, and inconsistent probably with the lawful exercise of the powers of the directors. Whatever, therefore, the literal terms of the deed of settlement, these debentures were, in my judgment, a breach of trust totally unwarranted and

* 414 good for nothing except as * evidence of a contract of debt, and as a contract of debt they are not opposed.

THE LORD JUSTICE TURNER. — In my judgment, also, upon the true construction of this deed of settlement, the subscribed capital not paid up does not constitute funds or property of the society within the meaning of the 227th clause of the deed. [His Lordship read the clause and proceeded thus:] I think, upon the construction of that clause, the same “funds or property” must be taken to have been referred to throughout the clause.

Then the question comes to this. It is clear from the latter

(a) 1 De G., J. & S. 29.

(b) 2 Hare, 239.

part of the section that the "funds or property" which are here referred to are funds or property which may be assigned, transferred, conveyed, or surrendered. What is the nature of the unpaid calls due from the subscribers to companies of this description? They are property not of the society immediately, but which may be called up by the directors of the society at their discretion. What are the duties of directors in the present case with respect to such calls? Plainly—upon the construction of the 220th clause of this deed—to make these calls at their discretion, and to exercise their discretion and judgment upon the question whether the calls should or should not be made. And how can they possibly assign calls which are to be made by them in the exercise of their discretion as part of the funds or property of the society. The consequence would be that the discretion which they are bound to exercise would be wholly defeated and put an end to.

But, again, consider what the remedy would be in respect of these calls, assuming the deed to have extended * to the * 415 future calls to be paid by the shareholders of the society. The remedy would be the appointment of a receiver to get in those calls. And how would it be possible for any receiver of this Court to exercise the discretion which, according to the deed, is reposed in the directors? And if the receiver could not exercise the discretion, then, upon the common and ordinary construction of the deed, it cannot be said that the power which was given to borrow money upon the funds and property of the society was to be exercised by means which, when exercised, could not be productive of the realization of the property for the payment of the debts. The receiver could not represent the board of directors for the purpose of making the calls.

I do not mean to say that there may not be cases where there may be an equity created to compel directors to make a call. But even assuming the existence of any such possible equity as an equity to call upon the directors to make the calls, that is clearly not what is contemplated by this deed,—what is contemplated by it being property to be assigned, transferred, conveyed, or surrendered. That is the security, and before the security can be made effectual, it must be shown that the property was covered by the clause, and was property which could be assigned, transferred, conveyed, or surrendered.

I agree, therefore, with the decision the Vice-Chancellor has come to on this point.

It is said that it is to the interest of the shareholders to give the widest construction to the clause. That may or may not be so. It may in many cases be much more for the interest of share-

holders that calls should be made to realize the property * 416 for the purpose of paying the liabilities * of the company, than that money should be borrowed, at perhaps an extravagant rate of interest, for the purpose of meeting the liabilities of the company.

I think this motion must be refused with costs; and as to the costs of the official manager and the creditors' representative, there must be a double set, hard though it be upon the appellant, because it is the interest of the creditors which is mainly concerned. The appellant asks for payment in priority to the other creditors. (a)

In the Matter of The JOINT-STOCK COMPANIES ACT,
1856 and 1857; and

In the Matter of The MOSELEY GREEN COAL AND COKE
COMPANY, LIMITED.

BARRETT'S CASE.

1864. June 8. Before the Lord Chancellor Lord WESTBURY.

Shares in a joint-stock company were allotted to and registered in the name of a person on the application in his name of another person to whom the former had lent the use of his name for the purpose, on condition that he was to be exposed to no liability in consequence, and who paid the deposit on the shares. The company being subsequently ordered to be wound up under the Acts of 1856 and 1857, and nothing having been done which could bind the company towards releasing the registered shareholder from his liability: *Held*, that whatever equities in the shape of right to indemnity might exist between him and the person applying in his name and the directors who had entered into an arrangement for his release, which was *ultra vires* and had not been sanctioned by the company, his name was properly placed on the register and list of contributories.¹

(a) See as to this point *Re The Era Life, &c., Assurance Company*, 1 De G., J. & S. 172.

¹ See 2 Lindley Partn. (3d Eng. ed.) 1890-1895.

THIS was an appeal motion in bankruptcy by Mr. Osman Barrett, seeking the reversal of an order made by Mr. Commissioner GOULBOURN, in whose Court the Moseley Green Coal and Coke Company, * Limited, was being wound up under the above- * 417 mentioned Acts, settling the appellant's name on the list of contributories for two hundred and fifty shares, or a reference back to the commissioner to resettle the list; and also an original motion in Chancery under the Joint-stock Companies Act, 1856, § 25, for rectification of the register by erasing therefrom the appellant's name as a shareholder. (a)

The facts of the case, as also the scope of the arguments on the part of the appellant, sufficiently appear from the Lord Chancellor's judgment.

Mr. Giffard and *Mr. C. T. Swanston*, for the appellant, relied upon *Cox's Case* (b) and *Whittet's Case*. (c)

Mr. E. F. Smith, for Mr. Corbett, was willing that his name should be put on the lists in lieu of that of the appellant, if the Court should think that course proper; but

Mr. Willcock and *Mr. Roxburgh*, for the official liquidator, declining to accept that offer, they were not called upon.

THE LORD CHANCELLOR. — The first question is, whether the appellant's name was placed upon the public register of shareholders in this company in such a manner as to make him liable to the consequences of being so placed as between himself and the shareholders.

* What took place between Mr. Corbett and the appellant * 418 undoubtedly warranted the placing of the appellant's name upon the list of shareholders for 250 shares. It is immaterial to the shareholders of the company what secret agreement may have been made between the person so registered and any other person with regard to his liability. The shareholder has a right to be put on the register in respect of his shares. All the other shareholders have a right as between themselves and him to look to and depend upon the register and to take the register as evidence

(a) See *Fox's Case*, 3 De G., J. & S. 465; *Bird's Case*, *supra*, p. 200.

(b) *Supra*, p. 53.

(c) 2 De G. & J. 577.

of his liability, unless that liability has been determined in a conclusive and binding manner by transactions on the part of the directors, which are legally valid and good to bind the company.

The transactions in the present case are these: The appellant consented to his name being put on the register at the instance of Mr. Corbett. Mr. Corbett's position with regard to the company was — under articles of agreement dated the 31st of January, 1861 — that of vendor of certain tracts or seams of coal which the company was formed to work. The purchase-money was to be a large sum, and was to be in part paid or accounted for to Mr. Corbett in shares of the company.

The powers of the directors are defined by the articles of association. The powers of the general meetings of the company are also there defined.

The directors were anxious to start the company, as the expression is, and for that purpose they wished to obtain a certain amount of subscriptions. They told Mr. Corbett that if he would subscribe for 250 shares in addition to the shares which were to be handed over to him in part payment of his purchase-money, a third person would subscribe for another named number of * 419 * shares, and that that subscription would enable them to start the company.

Mr. Corbett says that it was suggested to him that it would be better, and would give an appearance of greater solidity to the company, if this subscription for 250 shares was made by him in another name. He accordingly suggested the name of the appellant, and applied to him for that purpose; and what passed between them, although it was coupled with a personal engagement on the part of Mr. Corbett that the appellant should not be exposed to any liability, yet did, as I have already mentioned, so far as the company was concerned, give authority to Mr. Corbett from the appellant to put down the appellant's name as a subscriber for 250 shares.

Subsequently disputes arose between Mr. Corbett and the directors. Mr. Corbett complained that he had been induced to obtain this subscription for 250 shares by the representation as to the subscription on the part of the third person for a given number of shares, which representation had not been fulfilled. An action was brought and a bill was filed, and it ended in Mr. Corbett recovering judgment for 250*l.*, being the deposit of 1*l.* per share which

he had paid on the shares taken in the appellant's name, and in his also getting a decree for a large amount from the company. The result was, that a new arrangement and compromise was made between the directors and Mr. Corbett, and that under that new arrangement the relations between Mr. Corbett and the company were placed upon an entirely different footing, the result of the indenture whereby it was carried into effect being that Mr. Corbett was to be treated as entitled to recover the 250*l.* in the action; that one of the pleas in that action setting up misrepresentation on the part of Mr. * Corbett should be * 420 withdrawn; that the subscription made in respect of the appellant's shares should be regarded as annulled; and that Mr. Corbett should get back and deliver up to the company all shares which had been transferred to him in pursuance of the agreement of the 31st of January, 1831, other than certain 2030 shares already transferred by him. Under this agreement he states that he did give up to the company 1230 shares.

If these transactions which are thus stated to have taken place between Mr. Corbett and the directors were transactions which bound the company, the result would be that the company acknowledged Mr. Corbett as the true subscriber, agreed to annul the appellant's subscription, agreed to put an end to Mr. Corbett's equitable subscription, and agreed that Mr. Corbett should have the money repaid.

But I do not find that any one of these transactions which the directors took upon themselves to carry into effect as between themselves and Mr. Corbett in any respect bound the company, or were within the compass of the powers and authorities of the directors. Although, therefore, there is an entry in the share ledger made by the authority of the directors, by which 250 shares are expressed to be transferred from the appellant's name, yet there is no single act, no single dealing of release or alteration of agreement as between Mr. Corbett and the company made by the directors which is shown to be, or even attempted to be shown to be, within the powers and authorities of the directors.

The original contract of subscription made by the appellant through the agency of Mr. Corbett therefore remains still available to the company, and these illegal * transactions * 421 between Mr. Corbett and the directors do not bind it or in any respect avail to release the appellant from his liability.

It is said that there cannot be an ownership of the same shares in two persons.

There is an ownership here on the part of the appellant which makes him liable to the shareholders. There may be contracts and dealings between him and Mr. Corbett which may give the appellant an equity to call upon Mr. Corbett to indemnify him, which indemnity might involve the transfer of the shares ; but the question to be considered is not who is the person who was the owner, but who is the person who was liable to the shareholders in respect of legal tenancy at the time when the tree was cut down,—at the time of the winding-up order? That was the appellant. The dealings and transactions to which I have adverted, whatever validity they may have in creating personal contracts and personal equities as between the appellant and Mr. Corbett and the directors, are not available to the appellant as a shield wherewith to protect himself from the claims of the shareholders in this company who were innocent of any participation in those dealings and transactions, and who are not legally affected by the result of these irregular dealings of the directors which they had no legal authority from the company to enter into.

The learned commissioner has, therefore, in my judgment, arrived at a right conclusion with respect to the list of contributors, and the appellant's name must remain thereon. His motion to rectify the register must also be refused, and he must pay the costs of the appeal and of the motion.

* 422 * In the Matter of JOSEPH PATTERSON'S ESTATE.

MITCHELL v. SMITH.

1864. June 9. Before the LORDS JUSTICES.

A., the payee of certain promissory notes, who was upwards of seventy-nine years of age, brought them to his nephew B., saying, "I give you these notes," adding that B. should have them at A.'s death, but that the latter would like to be master of them as long as he lived. The notes not being indorsed were then indorsed by A. in the presence of one witness in the following way: "I bequeath — pay the within contents to B. or his order at

my death." Six months afterwards the testator died, and in a suit to administer his estate: *Held*, that B. had no right to the notes or the moneys thereby secured; the evidence showing that the transaction amounted to no more than an attempted testamentary gift, which failed.

THIS was an appeal by the plaintiffs in the cause from the refusal by Vice-Chancellor STUART to vary his chief clerk's certificate.

The matter and cause were instituted for the administration of the estate of Joseph Patterson, the testator therein, who died in March, 1860, and the certificate in question, so far as it was now sought to vary it, certified a right in the respondent Simon Smith, who was one of the executors, and, with Mr. Hudson his coexecutor, a defendant in the cause, to retain for his own use three promissory notes, of which the testator had been the payee, on the ground that they had been given and indorsed to him by the testator.

With reference to the circumstances of the alleged gift and indorsement, the respondent Simon Smith deposed in effect that on the 24th of September, 1859, his uncle the testator, who was then residing with him, brought from his (the testator's) bedroom three promissory notes and put them into the deponent's hands, saying, "I give you these notes," adding either immediately or within a short time afterwards that the deponent should have them at his (the testator's) death, but that the testator would like to be master of them as long as * he lived, meaning * 423 as the deponent believed, that the testator wished to have the interest of the notes during his life, but wished the principal thereby secured to belong to the deponent after his (the testator's) death; that the deponent looked at the notes and said they wanted indorsing; that the testator then suggested that the deponent's neighbour Stephen Teal should be sent for as a witness; that Stephen Teal was sent for accordingly, and came; that the deponent wrote indorsements on each of the notes, which the testator signed in the presence of Stephen Teal, and Stephen Teal signed his name thereto as a witness to each of such signatures; that the testator, at the time when he signed the three indorsements, was upwards of seventy-nine years of age, and neither at that time nor afterwards took any steps to call in the moneys secured by the notes or any part thereof, nor in any way expressed a desire to do so, and the deponent believed that the testator had no intention to call in the said moneys or any part thereof during his lifetime.

The indorsements in question were all in the same terms, and, as signed, were as follows : —

“ 24th September, 1859.

“ I bequeath — pay the within contents to Simon Smith or his order at my death.

“ JOSEPH (his + mark) PATERSON.

“ Witness, STEPHEN TEAL.”

Mr. Greene and *Mr. Wickens*, for the appellants. — The certificate ignores the use in the indorsements of the words “ I bequeath ” and “ at my death.” But those words are most important as showing that the testator had no intention of relinquishing his dominion over the notes during his life, as in fact the respondent

Simon Smith’s own account of the testator’s language shows * 424 to * have been the case. His intention in all probability was to make a testamentary gift of the notes so as to evade legacy duty. But as to the transaction being a testamentary gift, there was no contemplation of death on the part of the testator when the notes were given ; the transaction was incomplete, and therefore bad, whilst it was equally bad as a gift *inter vivos*, for the indorsements, as framed, gave the indorsee no immediate right to sue upon the notes. The notes consequently remained as part of the testator’s estate, and the certificate ought to be varied accordingly.

Mr. R. R. Hawkins, for the defendant *Mr. Hudson*, took no part in the argument.

Mr. Malins and *Mr. Rasch*, for the respondent *Simon Smith*. — The testator intended to make an immediate transfer of the notes to the respondent *Simon Smith* for his own benefit, subject to a life-interest therein in the testator’s own favour. This reservation of a life-interest explains the use of the words “ I bequeath ” and “ at my death.” The indorsements were sufficient and valid to transfer the property in the notes to the respondent *Simon Smith* with a right to sue upon them at the testator’s death. *Lloyd v. Howard*, (a) *Robertson v. Kensington*; (b) *Byles on Bills* (c)

(a) 15 Q. B. 995.

(b) 4 Taunt. 31.

(c) Ed. 8, pp. 140, 141.

Mr. Greene, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—This transaction was, in my judgment, meant by the testator, to be wholly testamentary, and as such it was *incomplete, ineffectual, and in- * 425 valid. The respondent Simon Smith did not, therefore, obtain thereby any right to the notes or any of them, or to the money thereby secured. And the certificate must be varied accordingly.

THE LORD JUSTICE TURNER.—In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent Simon Smith could not have done here during the testator's life. I express no opinion on the question which has been mooted in his favour, whether or not the indorsements here were sufficient, inasmuch as they enabled him to indorse and negotiate the notes after the testator's death: for, even assuming that to be the case, the question remains, what was the intention of the testator in delivering these notes with these indorsements upon them.

On this point I think, upon the language of the indorsements and the evidence of the respondent Simon Smith himself, that all that the testator meant was to pass the notes by way of testamentary disposition. To construe the indorsements as meaning that the indorsee was to hold the notes in trust for the testator during his life and then for himself absolutely, would be inconsistent with the testator's own declaration of his wish to be master of the notes as long as he lived.

The gift then being testamentary, but being also incomplete, fails, and the notes belong to the testator's estate, and the certificate must be varied accordingly. The costs of all parties in respect of the appeal should, I think, be costs in the cause.

* 426 * In the Matter of The COMPANIES ACT, 1862,

AND

In the Matter of The LLANHARRY HEMATITE IRON ORE
COMPANY, LIMITED.

RONEY'S CASE.

STOCK'S CASE.

1864. June 23. Before the LORDS JUSTICES.

The memorandum of association of a joint-stock company, registered under the Act of 1856, was signed by A. and B. each for twenty-five shares. A. and B. also each signed the articles of association, which regulated the number of the directors, named certain persons as the first directors, and provided that no person should be eligible as a director unless he should hold in his own right a certain number of shares as a qualification, and then provided that minutes should be made of proceedings of the directors in proper books, and that any such minute, if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, should be receivable in evidence without any further proof.

The minutes of one meeting of the directors, which were signed by A. as chairman, represented A. as a subscriber for 100 shares in the company. A. attended every meeting of the directors as chairman. B. attended one meeting only, whereat the only business transacted was the election of a new director.

The company being ordered to be wound up under the Act of 1862:

Held (affirming the decisions of the Master of the Rolls), —

- (1) That A. was liable to be put on the list of contributories for 100 shares, inasmuch as he was (regard being had to the minutes signed by him) *primâ facie* (but, *per* the Lord Justice TURNER, only *primâ facie*) liable for that amount, and he had not on the evidence discharged himself from the burden of that liability:
- (2) That B. was liable to be put on the list for twenty-five shares only, the Lord Justice KNIGHT BRUCE holding his case to be within the principles of *Lord Abercorn's Case* (4 De G., F. & J. 78); and the Lord Justice TURNER distinguishing *Currie's Case* (3 De G., J. & S. 367), and holding that the clause in the articles of association with reference to the qualification, without which persons were not to be eligible as directors, did not apply to persons placed in the position of directors by the articles of association, but only to persons thereafter to be elected directors.

THE first of these cases came before the Court upon a motion by Sir Cusack Patrick Roney by way of appeal from a decision of the

Master of the Rolls, and seeking that in the settling of the list of contributories of the Llanharry Hematite Iron Ore Company, Limited, * the appellant should be dealt with as liable * 427 in respect of twenty-five shares only.

The other case was a motion on behalf of the official liquidator by way of appeal from his Honor's decision, and seeking that the respondent Thomas Osborne Stock might be put on the list for fifty shares.

The company was one registered under the Joint-stock Companies Act, 1856, in the month of March, 1861, for the purpose of purchasing and working certain mines belonging to a Mr. Plant.

The appellant Sir Cusack Patrick Roney and the respondent Thomas Osborne Stock each signed the memorandum of association for twenty-five shares. They also each signed the articles of association, and these, amongst other clauses, contained the following provisions: —

“No person shall be deemed to have accepted any shares in the company unless he has testified his acceptance thereof by writing under his hand in such form as the company from time to time directs.”

“The number of directors shall not be less than four nor more than eight.”

“The following persons shall be the first directors of the company: Sir C. P. Roney, J. S. Adam, T. O. Stock, F. Tothill, and C. H. Waring, Esqrs.”

“No person shall be eligible as a director of the company unless he shall hold in his own right fifty shares at the least.”

“The directors shall cause minutes to be made in books provided for the purpose: (1) of all appointments of officers made by the directors; (2) of the names of * the directors * 428 present at each meeting of directors and committees of directors; (3) of all orders made by the directors and committees of directors; and (4) of all resolutions and proceedings of meetings of the company and of the directors and committees of the directors; and any such minute as aforesaid, if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, shall be receivable in evidence without any further proof.”

Several meetings of the directors were held. At one held on

3d of September, 1861, a resolution was passed, which was thus entered in the minute-book :—

“On a calculation of the capital with which the company could be started under the contract for raising ore, proposed by Mr. Davies, it was found that from 750*l.* to 1000*l.* would be sufficient for one year's working, and seeing that 660 shares equal to 6600*l.* are subscribed for as follows : [Here followed a list of the names of fourteen persons, with the numbers of shares to be taken by them respectively ; amongst them being the name of the appellant Sir Cusack Patrick Roney as taking 100 shares, but the name of the respondent Thomas Osborne Stock not appearing in the list at all] — Resolved, after due consideration, to proceed forthwith with the company,” &c.

This minute so entered was signed by the appellant Sir Cusack Patrick Roney as chairman ; as in fact were all other minutes, the appellant having attended every meeting and presided thereat as chairman.

The respondent Thomas Osborne Stock was present at one meeting only, viz., a meeting held on the 21st of March, 1862, when the only business transacted was the election of a new director.

* 429 * The company having been ordered to be wound up in January, 1863, Mr. Stephen James Green, the secretary, was examined before the chief clerk in August of that year.

He stated as to the minutes of the meeting on the 3d of September, 1861, that the names of the parties subscribing for shares were not set out in the draft minutes, but were supplied from a list made out at the time, and as to the appellant Sir Cusack Patrick Roney, who was present, by his own direction.

Mr. Green, in an affidavit subsequently made by him, stated in effect that certain of the minutes in the book, including those of the meeting of the 3d of September, 1861, were entered up by him at the commencement of the winding up and then signed by the appellant Sir Cusack Patrick Roney on the deponent's statement to him that they were correctly entered up and without reading them. He further stated that the minute of the meeting of the 3d of September, 1861, was written up by him from a rough minute which did not contain any such list of persons or amounts as were contained in the minute ; that the appellant Sir Cusack

Patrick Roney did not in fact subscribe for one hundred shares as there stated, and that the statement had been inserted by him under a misconception.

The appellant Sir Cusack Patrick Roney deposed (amongst other matters) that he agreed to become a director on the understanding that Mr. Plant was to give him the necessary qualification, which he always understood to be only twenty-five shares; and that the minutes of the meeting of the 3d of September, 1861, as signed, were incorrect so far as they represented that he had agreed to take one hundred shares in the company; and * that the rough minutes of the entry (which were * 430 partly in his own handwriting) differed in omitting the words "as follows," and the list of names of persons and numbers of shares.

Mr. Plant deposed that he had promised to give each of the directors the necessary qualification out of the fully paid-up shares which formed part of the consideration for the purchase from him in order to start the company.

No formal allotment of shares was ever made, nor was there ever any proper register of shareholders; but in a list of shareholders furnished to the creditor of the company, on whose petition the winding-up order was afterwards made, by the secretary in December, 1862, under a summons in the Lord Mayor's Court, the name of the respondent Thomas Osborne Stock was inserted for twenty-five paid-up shares, and that of the appellant Sir Cusack Patrick Roney for eight hundred paid-up shares alleged to be held by him as a trustee for Mr. Plant.

Under these circumstances the official liquidator placed the name of the appellant Sir Cusack Patrick Roney on the list of contributories for one hundred and that of the respondent Thomas Osborne Stock for fifty shares; and by the orders under appeal the Master of the Rolls affirmed the proceeding as to the appellant Sir Cusack Patrick Roney, holding, however, that the respondent Thomas Osborne Stock was only liable to have his name on the list for twenty-five shares.

Mr. Southgate and *Mr. Roxburgh*, for the official liquidator, referred to Stat. 19 & 20 Vict. c. 47, § 10, and distinguished the present case from *The Marquis of Abercorn's* * 431

Case (a) and *Currie's Case*. (*b*) They referred also to *Saunders's Case*, (*c*) *Daniell's Case*, (*d*) *Nicol's Case*. (*e*)

Mr. Baggallay and *Mr. Marten*, for the appellant Sir Cusack Patrick Roney and the respondent Thomas Osborne Stock, commented on the cases referred to on the other side, and further referred to *Ex parte Cotterell*. (*g*)

Mr. Southgate, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — With regard to what is here attributed to Sir Cusack Patrick Roney, the burden is on him to deliver himself; because it is plain that he has distinctly acknowledged himself in writing to be the holder of one hundred shares.

The burden so lying, it is said on his behalf that he made this acknowledgement under a mistake and misapprehension, and that the truth of the case was otherwise. Upon this point there is a considerable body of evidence, which body of evidence satisfied the Master of the Rolls, as it most clearly satisfies me, that the truth was with the acknowledgment; and that it was accurately stated by him, accurately admitted by him, that he was the holder of one hundred shares.

His appeal, in my judgment, fails, and should be dismissed with costs.

With regard to Mr. Stock the case may be less plain.

* 432 * The Master of the Rolls seems not to have thought ill morally of his case, and to have considered that he was within the benefit of the ruling in *The Marquis of Abercorn's Case*. (*a*) Certainly the two instances are specifically different. The question, however, is, whether there is not sufficiency of similarity or of identity to bring Mr. Stock within the principles on which Lord Abercorn's case was decided; and I think with the Master of the Rolls that there is, and that the appeal of the official liquidator in this respect fails. He may, however, take his costs out of the estate.

(*a*) 4 De G., F. & J. 78.

(*b*) 3 De G., J. & S. 367.

(*c*) 2 De G., J. & S. 101.

(*d*) 1 De G. & J. 372.

(*e*) 3 De G. & J. 387.

(*g*) 32 L. J. N. S. Ch. 66.

THE LORD JUSTICE TURNER. — I agree with the Master of the Rolls as far as respects Sir Cusack Patrick Roney's shares.

According to the terms of these articles of association, the minutes, signed by any person purporting to be the chairman of any meeting of directors or committee of directors, are to be receivable in evidence without any further proof. In fact, therefore, the entry in the minutes of the 3d of September, 1861, is *prima facie* evidence against Sir Cusack Patrick Roney in this case. I think that it is only *prima facie* evidence, but it is quite sufficient to throw on him the *onus* of discharging himself from the effect of the evidence. Whether he has done so or not depends on the facts which are in proof before us.

His case, as I understand it, is this: that he never agreed to take more than twenty-five shares in this company, and those were paid-up shares. They were to be * supplied out * 433 of the eight hundred shares or the larger number of shares to which Mr. Plant was to be entitled. Then he says further that the eight hundred shares which were standing in his name were the shares of Mr. Plant and not his own shares, and were held by him in trust for Mr. Plant.

That argument is met on the other side by Mr. Green's evidence in the early stage of this matter in August, 1863, and by the document F. which is in evidence before us. Mr. Green, in his evidence, states that the names of the parties subscribing for shares were not set out in the draft minutes, but were supplied from a list made out at the time, being document F. Mr. Green says that he made out that list as to numbers 1 to 8, which do not include Sir Cusack Patrick Roney, from the written applications for shares of the persons represented by those numbers respectively; and that as to the next three, — one of whom was Sir Cusack Patrick Roney for 100 shares, — he made out the list from the direction of the three gentlemen in question themselves. Mr. Green expressly swears, therefore, that he had the direction of Sir Cusack Patrick Roney to put him down as a subscriber for 100 shares.

That evidence is met thus. It is said that Mr. Green has in a subsequent affidavit stated that he acted under a misconception, and that Sir Cusack Patrick Roney did not say that he would subscribe for 100 shares, but said that he would subscribe 100% towards the sum required to start the mine. But in my judgment

the facts of the case bear out the original representation made by Mr. Green in his original evidence, and not the representation which is contained in his affidavit. I do not find through-
* 434 out the whole course of the proceedings in this * case that there was any such transaction as a loan by Sir Cusack Patrick Roney of 100*l.* to the company. There is nothing more than several advances amounting in the whole to 250*l.*, the exact amount payable in respect of the twenty-five shares for which, as he admits, he subscribed. Taking, therefore, the original statement, there is the fact that Sir Cusack Patrick Roney did direct Mr. Green to put him down as a subscriber for 100 shares.

I think, therefore, that on that evidence there can be no doubt that he is liable for the 100 shares.

The case as to Mr. Stock depends on wholly different circumstances. The question there is whether he, having become a director of the company, is liable for fifty shares which constitute the qualification of a director, it being admitted that he is liable for twenty-five for which he subscribed.

I agree with the Master of the Rolls that Mr. Stock is not liable for fifty shares. In my judgment these articles of association do not as to the qualification of fifty shares apply to the directors who are nominated in the articles. They prescribe the number of the directors, and certain persons, among whom are Sir Cusack Patrick Roney and Mr. Stock, are declared to be the first directors; and then it is provided thus, "No person shall be eligible as a director of the company unless he shall hold in his own right fifty shares at the least." I think that the word "eligible" applies to persons to be elected and not to persons who, by the articles of association themselves, had been placed in the position of directors; and in this respect the present case
* 435 appears to me distinguishable * from *Currie's Case*, (a) referred to by *Mr. Southgate*, where the subscribers of the memorandum of association were to nominate the directors, and were held to have nominated themselves, and when so nominated became subject to the provisions of the articles of association.

I agree with the Master of the Rolls in both of these cases; and I agree with my learned brother in respect of the costs of the official liquidator. Mr. Stock's costs will come out of the company's estate.

(a) 3 De G., J. & S. 367.

EYRE v. BURMESTER.

1864. April 20. June 25. Before the Lord Chancellor Lord WESTBURY.

A mortgagor induced his second mortgagee to release the mortgaged estate in consideration of the substitution of other securities; and then created a third mortgage on the estate so released. Afterwards he created a fourth mortgage on the estate. This mortgage was made with the concurrence of the third mortgagees, who joined to postpone their security, and who received part of the money raised on the security of the fourth mortgage in part discharge of the moneys due to them upon their own security. The mortgagor then died, and it was for the first time discovered that the securities substituted in the hands of the second mortgagee, and which were the consideration for the release executed by him, were forgeries. The fourth mortgagees sold the mortgaged estate, and after paying off the first mortgage retained the surplus in part discharge of the moneys due to them on their security. The net value of the estate after payment off of the first mortgage having been thus ascertained, the second mortgagee filed his bill against the third mortgagees seeking to recover the amount of that net value from them, they having received, as above mentioned, part of the moneys raised on the security of the fourth mortgage to an amount exceeding the net value of the estate: *Held*, that he was not entitled to such relief.

THIS was an appeal by the defendant John William Burmester, who was one of the registered public officers of the London and County Joint-stock Banking Company, from a decree of the Master of the Rolls, whereby his Honor granted with costs the relief sought by the bill.

* The suit was instituted to recover from the bank, * 436 which, under the circumstances herein after mentioned, had received a sum of 35,000*l.*, the sum of 17,694*l.* as the net value (after satisfying a prior legal mortgage) of an estate in Ireland, called the Castle Grace estate, which had belonged (subject to that legal mortgage) to the late John Sadleir, and, so subject, had been mortgaged by him first to the plaintiff in the suit Thomas Joseph Eyre (who was the respondent on the present appeal), and secondly, and under the circumstances hereafter appearing, to trustees for the bank; and to make the bank account for the rents of the estate.

The suit formed part of the legal proceedings instituted by the respondent, when by the death of John Sadleir he discovered the position in which the conduct of the latter had placed him.

These proceedings had in two preceding cases, viz., the cases of *Eyre v. M'Dowell* (a) and *Eyre v. Burmester*, (b) come before the House of Lords.

The circumstances under which the present case arose were identical with those under which the last mentioned case arose, the Castle Grace estate having been contained, together with the Kilcommon and the Clonmore estates, which were in question in that case, in the mortgages above referred to. The difference between the cases was, that while at the time of John Sadleir's death the position of the Kilcommon and the Clonmore Estates remained unaltered, the Castle Grace estate had been mortgaged, and the mortgage moneys dealt with as herein after is mentioned.

* 437 * So far as it is necessary for the purposes of this report to state them, the facts of the present case were as follows, the statement being in the main taken from the judgments of the Master of the Rolls and the Lord Chancellor: —

On the 20th of October, 1854, John Sadleir conveyed to the respondent various estates in Ireland called the Kilcommon, the Clonmore, and the Castle Grace estates, by way of indemnity to secure him against the insufficiency of certain other estates, relying upon which, and upon John Sadleir's representations concerning them, the respondent had advanced large sums of money. The conveyance provided that so long as John Sadleir paid the respondent 3000*l.* per annum, he should be at liberty, either himself or by the hands of James Baron Kennedy, to receive the rents of the estates thereby conveyed, and James Baron Kennedy was appointed receiver on behalf of both John Sadleir and the respondent. Out of the rents he was to pay, in the first place, rates and taxes; secondly, costs and expenses, together with 5*l.* per cent. commission to himself; thirdly, 3000*l.* to the respondent, and the residue to John Sadleir.

At this time John Sadleir was a shareholder, director and chairman of the London and County Joint-stock Banking Company, which carried on business in England, and he so continued till his death in February, 1856.

(a) 9 H. L. Cas. 619.

(b) 10 H. L. Cas. 90. In *Cory v. Eyre*, 1 De G., J. & S. 149, the present respondent was a defendant in respect of transactions arising out of his connection with John Sadleir.

In June, 1855, John Sadleir was indebted to the bank in a sum exceeding 200,000*l.*, and he was desirous of borrowing from the bank a further sum of 95,000*l.*, which the bank consented to advance on the security of various large estates in Ireland belonging to him, the * particulars of which, and of the in- * 438 cumbrances thereon, he had professed to furnish to the bank. These particulars, however, contained no intimation of the mortgage security to the respondent.

15,000*l.*, part of the money required, was advanced to John Sadleir in July. On the 1st of August, in order to secure this and the further amount to be advanced, he executed twenty indentures, conveying the estates therein mentioned to the appellant and two other gentlemen as trustees in trust to secure the debt due to the bank, and they executed a deed of trust, dated the next day, declaring that they stood seised of all the property upon trust to realize the same, and out of the proceeds to pay the money due to the bank from John Sadleir, and that a more formal declaration of trust should be afterwards executed, which was accordingly done on the 7th of September following.

By this document it was declared in effect that the trustees should stand seised and possessed of the hereditaments in question, and the moneys to arise from the sale and realization thereof, and the rents and other produce thereof until such sale and realization, upon trust to sell the same and receive the purchase-moneys, or so much thereof as might not be required to satisfy or discharge any of the incumbrances for the time being affecting any of the hereditaments, and might not be received by the person or persons for the time being entitled to such incumbrances respectively; and to stand possessed of the moneys to arise from the sale, or so much of the same moneys as should be received by them after satisfying or discharging thereout the several incumbrances aforesaid, upon trust in the first place to pay the costs, charges, and expenses of and incidental to the completion of the several indentures of the 1st of * August, 1855, and * 439 of the declaration of trust and incidental to the trusts; and to stand possessed of the residue in trust for John Sadleir.

By a deed dated the following day, the 8th of September, 1855, after reciting amongst other things that John Sadleir was indebted to the bank in the sum of 287,672*l.* 7*s.* 6*d.*, carrying interest at 5*l.* per cent, John Sadleir assigned to the same trustees all the moneys,

rents, interest, and produce to arise under the deed of the 7th of September upon trust to pay first the costs and expenses of the trust, and secondly to pay the sum of 287,672*l.* 7*s.* 6*d.* due to the bank.

Three of the twenty indentures, to which reference has been made, conveyed lands subject to the respondent's mortgage; namely, the Kilcommon, the Clonmore, and the Castle Grace estates.

Early in August, 1855, Mr. Stevens, of the firm of Messrs. Wilkinson & Stevens, the solicitors of the bank, went to Ireland for the purpose of registering the deeds of conveyance; when, on the 13th of August, he ascertained from Mr. James Baron Kennedy the nature and effect of the deed of the 20th of October, 1854, creating the respondent's incumbrance.

At this time 25,000*l.* of the money required by John Sadleir remained unadvanced by the bank.

Mr. Stevens telegraphed to London the news of the respondent's incumbrance; in consequence of which the further payment was stopped, and on the same day application was made to John Sadleir on the subject. In answer to this application he assured the bank that the respondent's incumbrance was a mere
* 440 collateral * security, and that he would get the respondent to release the estate.

On the faith of this promise, on the 16th of August, 1855, two checks on the bank, one for 10,000*l.* and another for 15,000*l.*, were handed to John Sadleir, who duly received the money.

On the 13th of August, the day on which the telegraphic message arrived from Ireland, and after it had been communicated to John Sadleir, he applied by letter to the respondent and asked him to release the three estates, and to take in lieu thereof other securities. The respondent consented to this change of securities, and executed the release of the estates, which was dated the 5th of October, 1855, and on that day received the securities agreed to be taken in lieu of them.

Every one of those documents was false. They were all forged by John Sadleir for the purpose of defrauding the respondent, and, by inducing him to release the three estates, of completing the security to the bank.

The deed of release executed by the respondent did not, however, get into the possession of the bank or its trustees. It was sent by

Mr. James Baron Kennedy to John Sadleir, and by him retained until the transaction with Messrs. Backhouse next herein after mentioned.

After the release of October, 1855, had been obtained, and before the fraud of John Sadleir was discovered, he contracted with Messrs. Backhouse & Co., who were bankers at Northampton, for the loan of a sum of 89,072*l.*, on the security of the estates comprised in the mortgage to the bank, and including also the estates which had * been released by the respondent. The * 441 bank joined in this mortgage, which was dated 31st of December, 1855. Of this sum of 89,072*l.*, 36,000*l.* only was actually paid in money by Messrs. Backhouse, and of this 35,000*l.* was paid by direction of John Sadleir to the bank, and 1000*l.* was paid to John Sadleir himself.

John Sadleir died by his own hand in February, 1856, and on his death all his frauds and forgeries were revealed. The rents of the Castle Grace estate, anterior to the discovery of these frauds and forgeries, the repayment of which, as has been stated, formed part of the respondent's claim in this suit, had been received by the receiver during John Sadleir's life and paid over to him.

Messrs. Backhouse, when the fraud of John Sadleir had been discovered, but before any proceedings had been taken by the respondent, sold the estates comprised in their security under an order of the Landed Estates Court in Ireland, and after payment off of the prior incumbrancer who held the legal estate, the residue of the purchase-money of the particular estate in question, namely, the Castle Grace estate, amounting to 17,694*l.*, was received by Messrs. Backhouse.

The respondent sought, and as the Master of the Rolls decided properly sought, to recover this sum from the London and County Joint-stock Banking Company, they having received 35,000*l.* under the circumstances herein before mentioned; and it was from the decision thus made that this appeal was brought.

Mr. W. M. James and *Mr. Beales* appeared for the respondent.

* *The Attorney-General* (Sir R. PALMER), *Sir Hugh* * 442 *Cairns*, and *Mr. Surrage*, for the appellant.

The following authorities were referred to, viz. : —

On the part of the respondent: *Eyre v. Burmester*, (a) *Bridgman v. Green*, (b) *Huguenin v. Baseley*, (c) *Scholefield v. Temple*, (d) *Wall v. Cockerell*, (e) and

On the part of the appellant: *Phillips v. Phillips*, (g) *Thorn-dike v. Hunt*, (h) *Knight v. Majoribanks*. (i)

June 25.

THE LORD CHANCELLOR. — In the former case between the parties to the present record, the House of Lords decided that the release, dated the 5th of October, 1855, which had been obtained by John Sadleir from the then appellant, Mr. Eyre, by a gross fraud, was void as between Mr. Eyre, who is the present plaintiff, and John Sadleir, and that it had no operation in favour of the London and County Bank by estopping Mr. Eyre from claiming the benefit of his security in priority to that of the bank.

The Master of the Rolls appears to have thought that the decree made by him in the present case was a mere consequence of that decision, and that the plaintiff, Mr. Eyre, had a right to follow into the hands of the bank money paid to the bank by John Sadleir, because that money was raised on the security of one of the estates charged with the plaintiff's prior incumbrance, although at the time when such money was borrowed by John
*443 * Sadleir and paid over to the bank, the latter had no notice whatever of the fraud that had been practised on the plaintiff.

No such consequence follows from the decision of the House of Lords or the principles on which it was founded. The House had not to consider the effect of any dealing, subsequent to and on the faith of the release, between John Sadleir and a purchaser for valuable consideration without notice.

Again, the Master of the Rolls has treated the mortgage by John Sadleir to the Messrs. Backhouse as if it had been a sale to

(a) 10 H. L. Cas. 90.

(c) 14 Ves. 273, 288.

(b) 2 Vea. Sen. 627; Wilmot, 58.

(d) Johns. 155; 4 De G. & J. 429.

(e) 3 De G., F. & J. 737; 10 H. L. Cas. 229.

(g) 4 De G., F. & J. 208.

(i) 2 Mac. & G. 10.

(h) 3 De G. & J. 563.

the latter by the trustees of the bank. That is not the nature of the transaction. From some accident the facts do not appear to have been accurately stated to the Master of the Rolls.

[His Lordship then stated the facts in question and those relating to the subsequent sale of the estate to the effect of the statement of them above given, and proceeded thus : —]

The equity of the present bill is supposed to be this, that the plaintiff, having lost his right to follow the estate so sold, is entitled to reclaim from the bank the sum of 17,694*l.*, which he alleges represented that part of the value of the estate still subject to his prior security in equity, out of the 35,000*l.* received by the bank from John Sadleir.

The Master of the Rolls, as I have said, has treated this mortgage by John Sadleir to the Messrs. Backhouse, in which the bank and the trustees of the bank joined as if it had been a sale made by the trustees of the bank under the power contained in their own security, and as if the trust declared by that security imposed on * the trustees of the bank the obligation of pay- * 444 ing in the first instance the prior incumbrancer.

That, however, as I have also said, is not the nature or effect of the deed of December, 1855. The deed, a copy of which I have before me, is a simple mortgage by John Sadleir to the Messrs. Backhouse, in which the bank joins merely for the purpose of postponing its own security to the security of the Messrs. Backhouse. The deed proceeds upon a contract of borrowing by John Sadleir of the Messrs. Backhouse, and upon an agreement by the bank to assist John Sadleir in that transaction by postponing its own security to the extent of the property comprised in the security given by this deed to the Messrs. Backhouse.

The money, therefore, is simply money received by John Sadleir and paid over by him to the bank, his creditor, *bonâ fide*, so far as the bank was concerned. The bank had no knowledge of the fraud which had been practised in obtaining the release at the time when this mortgage to the Messrs. Backhouse was made and at the time when the 35,000*l.* was received.

It was ingeniously put in argument by *Mr. James*, that the money was obtained by the use of a fraudulent instrument, and that the person who had suffered by that use of the fraud which

had been practised upon him had a right to pursue that which was obtained by means of that fraud. That might have been perfectly right if the money had been still in the hands of the Messrs. Backhouse or in the Incumbered Estates Court. The plaintiff might then have had a right to say that he was still the prior incumbrancer; and although he could not have recovered against the

Messrs. Backhouse, as purchasers for valuable consideration * 445 on the faith of his release, * any thing to the prejudice of their security, yet he might have pursued, subject to that right, the whole of the property that was comprised in the release, and also in the mortgage to the Messrs. Backhouse.

But that is not the transaction. The plaintiff admits that he cannot follow the estate. He admits that he has no claim against the Messrs. Backhouse, but he seeks to have repaid to him money which was *bonâ fide* received by the bank from its debtor John Sadleir. The plaintiff might just as well have asserted the right to reclaim from any other creditor of John Sadleir—his wine-merchant or his tailor—money that had been paid by John Sadleir to such creditor. The money was borrowed by John Sadleir from the Messrs. Backhouse, and the money was *bonâ fide*, so far as the bank was concerned, paid by John Sadleir to the bank; and there is no possible relation in which the bank stands to the plaintiff to entitle the latter to recover any portion of that money. It is merely the case of there being three incumbrancers, one who does not appear, who has the legal estate; the plaintiff, who in equity is in reality the second incumbrancer; and the bank, which is the third incumbrancer. Then the mortgagor, the owner of the equity of redemption, joining with the third incumbrancer, who postpones his security, creates a further mortgage based upon a contract for a further loan to the owner of the equity of redemption; and out of the money so received by him he pays a portion to the third incumbrancer, in part discharge of his incumbrance. That does not entitle the second incumbrancer in any view of the case to claim that money; and when the question of the fraudulent dealing is imported into the case, the answer to that is, that, at the time when the money was received, the bank who received it, being *bonâ fide* creditors of John Sadleir, knew nothing * 446 at all with * regard to the fraud of Sadleir, or the fraudulent use made of it by him.

With regard to the rents of the estates which are also claimed

by the bill, the evidence comes to this: that the Castle Grace estate, together with several other estates, was subject to a receiver, and that the whole of the rents anterior to the discovery of the fraud which came to the hands of the receiver were paid over to Sadleir. I am unable to discover that any sum of money has been received by the bank which the incumbrancer, Mr. Eyre, can claim to recover. It was put in argument on the ground that money had been received by the bank from the receiver, who was bound to apply it according to the priorities of the incumbrancers, and that therefore, as he would have been bound to recognize the plaintiff as a prior incumbrancer, the plaintiff now has a right to the restitution of that money.* The evidence, however, displaces the argument, showing as it does that all the moneys received by the receiver were paid over to John Sadleir, and that no part of them was paid to the bank.

The bill is founded upon a mistake. The decree of the Master of the Rolls appears to have been grounded upon an erroneous apprehension of the facts of the case, and must be reversed; and the bill must be dismissed, with costs.

* In the Matter of The COMPANIES ACT, 1862; * 447
AND
In the Matter of The NEW THEATRE COMPANY, LIMITED.

BLOXAM'S CASE.

1864. June 9. July 1. Before the LORDS JUSTICES.

Shares in a limited liability company were applied for, and the applicant gave a check for the amount of the deposit to the secretary of the company, with a stipulation that if the applicant did not get the shares in a few days, the secretary should return him the check or the money. The shares were allotted to the applicant two days afterwards, and his name was entered as that of an allottee in one of the company's books; no issue of the shares, however, or notification of their allotment, was made to him; nor did he pay the additional amount payable on the shares on their allotment. The company being wound up under the Companies Act, 1862:—

Held, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*hæsitante* the Lord Justice KNIGHT BRUCE), that the applicant was

properly placed on the list of contributories, the contract between the company and the applicant having become perfect and binding upon the latter when the allotment was made, and notice of the allotment not being necessary to perfect the contract.

THIS was an appeal motion by Mr. G. F. Bloxam, seeking the reversal of an order made by the Master of the Rolls upon an adjourned summons in the winding up of the above-mentioned company, under the Companies Act, 1862, settling the appellant on the list of contributories in respect of one hundred shares.

The case in the Court below is reported in the 38d volume of Mr. Beavan's Reports, (a) where the facts are stated.

For the purposes of this report the facts of the case and the scope of the arguments sufficiently appear from the judgment of Lord Justice TURNER.

Mr. Roxburgh appeared for the appellant, and

Mr. Selwyn and *Mr. Beavan*, for the official liquidator.

* 448 * *Carmichael's Case*, (b) *Yelland's Case*, (c) and *Cookney's Case* (d) were referred to.

Judgment reserved.

July 1.

THE LORD JUSTICE TURNER. — This was a motion to set aside an order of the Master of the Rolls, by which the appellant has been put on the list of contributories of a company for one hundred shares.

The company was a limited liability company, with a capital of 125,000*l.* in 5000 shares of 25*l.* each, and by the terms of the prospectus, 1*l.* per share was to be paid by way of deposit upon the application for the shares, and 2*l.* per share upon the allotment of the shares.

The case stands thus upon the evidence: the appellant admits that he applied for the shares, and that on the 25th of April, 1863, he handed to the secretary of the company a check for 100*l.* for the deposit upon the shares; but he says, and it is not denied

(a) Page 529.

(c) 5 De G. & S. 895.

(b) 17 Sim. 163.

(d) 26 Beav. 6; 3 De G. & J. 170.

by the secretary of the company, that before the appellant handed over the check to the secretary, he asked the secretary when he could have the shares, and was told by him that he could have them in a few days, as the company were about to allot them, and that he then stipulated with the secretary before giving him the check, that if he did not get the shares in a few days the secretary should return him the check or the money. The appellant also says, and there is no contradiction of the statement, that

* on the 27th of April, 1863, he called at the office of the * 449 company in Cornhill to inquire about the shares, and that he then found the office closed, and no one there from whom he could get any information. He states further that on making further inquiries about the company, he was informed that it had gone to pieces, and that no shares had ever been issued.

On the other hand, it appears upon the cross-examination of the secretary, that the shares were allotted on the 27th of April, and that the appellant's name was entered in the register of allotted shares, and that there was a regular register of shares; but he could not say whether the appellant's name was entered in it; that he paid the appellant's check into the bank on the 27th of April, the day of the allotment, and that some shares were issued, but none were issued to the appellant. He further states that the company left their office in Cornhill on the 25th or 27th of April; that the meeting for the allotment was held at Westminster; that he cannot say that the company was not virtually defunct when it left Cornhill, but he says that it removed to the Theatre Royal, Westminster, because it was more convenient, and that a notice was put on the door at Cornhill, stating where the office of the company had been removed to.

In this state of circumstances there was, in my judgment, a binding obligation on the part of the appellant to complete and conclude the agreement on his part to take the shares.

When he paid the 100*l.* he knew that the shares had not been allotted. There were two things then remaining to be done before he could get the shares, — one on the part of the company, the other on the part of the appellant. * The company had * 450 to make the allotment, and the appellant had to pay the 2*l.* per share which was payable on the allotment being made. The company made the allotment; and upon this being done the contract was no longer executory. It was executed on the part of the

company, and the appellant cannot, I think, recede from it. It then became the appellant's duty to pay the 2*l.* per share. This he failed to do; but he cannot, I think, set up his own default to discharge him from the contract.

It was said on his part that he had no notice of the allotment, and that notice ought to have been given to him; but looking at the case, without reference to the express stipulation made by the appellant, I think that the contract became perfect and binding upon the appellant when the allotment was made, and that notice of the allotment was not necessary to perfect the contract, more especially as the appellant knew that the allotment was about to be made.

As to the express stipulation made by the appellant, I think that it must be understood to have had reference to the shares being allotted to him, and not to being actually delivered to him; as he must of course have known that he could not have the shares without paying what would be due upon the allotment of them. There does not appear to have been any fraud practised upon the appellant, in order to induce him to purchase these shares. It appears from his own evidence that the purchase was a speculation on his part; and, as it has in my judgment become binding upon him, I think he must abide by it. I have little doubt that the true state of the case is, that the appellant held back from paying the 2*l.* per share in order that he might see how the speculation would turn out; otherwise he would of course

* 451 have *demanded the repayment of the 100*l.* *Carmichael's Case*, (*a*) which was cited on his part, has no application to this case: in that case there had been no definite agreement to take any number of shares, and no undertaking; no deposit was made, and what was said about the allotment had reference to this circumstance.

On the whole, I think this appeal should be dismissed, and with costs.

THE LORD JUSTICE KNIGHT BRUCE. — I am not quite satisfied in this case: but the judgment of the Lord Justice necessarily affirms the order of the Master of the Rolls; and as the inclination of my opinion was rather against the appellant, I think I ought not to dissent from the manner of dealing with the case, and the costs which the Lord Justice has proposed.

(*a*) 17 Sim. 168.

* FORSTER v. RIDLEY.

* 452

1864. July 2, 4, 5. Before the LORDS JUSTICES.

Circumstances under which the Court making to executors and trustees an allowance for trouble and loss of time in managing the testator's leasehold property and carrying on his business, fixed the amount itself, without directing an inquiry.

THIS was an appeal from a decretal order made by his Honor the Master of the Rolls in an administration suit, which had been instituted with the main object of setting aside as between *cestuis que trustent* and trustees a certain indenture dated the 9th of May, 1861.

As the result of the litigation between the parties, — which the Lord Justice KNIGHT BRUCE in his judgment characterized as a “calamitous litigation, which out of Court, as well as in Court, has occupied a considerable time,” the Lord Justice TURNER expressing also his entire disapprobation of the suit, by the frame of which his Lordship thought justice had not been done to the executors, — their Lordships set aside the deed in question: and the question then arose which is referred to in the portions of the judgments of their Lordships stated below, and on which question alone it is considered desirable here to notice the case.

Mr. Selwyn, Mr. Baggallay, Mr. Hobhouse, Mr. Nalder, Mr. G. L. Russell, and Mr. Jessel, appeared for the various parties to the suit.

THE LORD JUSTICE KNIGHT BRUCE. — Then comes the question whether the executors should have any allowance for their trouble and loss of time in managing the testator's leaseholds and carrying on his business for the space of time — two years, I think — * during which they did so: and the circumstances * 453 are such and so peculiar, and so much took place on the subject, that I think there should in this particular case be some allowance.

In many cases where such an allowance is thought necessary an inquiry is directed. But I think we have seen enough here to say that to direct an inquiry in this case would be to add to the griev-

ous calamity which this suit has already been, and will probably yet be. Thinking there ought to be some allowance, we think it right to fix the amount ourselves, and we declare that the executors ought to be allowed out of the estate 120*l.* in the whole, to be divided equally between them.

THE LORD JUSTICE TURNER. — The position of the case in respect of the question of the allowance to the executors and trustees is, that the parties entitled to three-fourths of the property desired the executors and trustees to carry on the business; and I do not see what could have been better than so to do, until the young man reached twenty-one. I think, therefore, that an allowance ought to be made for the loss of time and trouble by the executors and trustees in carrying on the business; and I think it is better for us to fix that amount ourselves. That course is not a new one. I have a very vivid recollection of a case in the Privy Council, — a curious and complicated case, — where the Privy Council fixed a certain share of a business as the amount to be allowed. I am very glad to adopt that case in the Privy Council as a guide in this case, and we fix the amount here at 120*l.*

* 454 * In the Matter of The **TRUSTEE RELIEF ACT**;
AND
In the Matter of **ARMSTON'S TRUSTS.**

1864. July 7. Before the **LORDS JUSTICES.**

The Court has jurisdiction to order an unsuccessful claimant on a fund paid into Court under the Trustee Relief Act, 10 & 11 Vict. c. 96, to pay the costs of an application for payment of the fund out of Court.

THIS was an appeal by Charles Whitley from an order of Vice-Chancellor Sir JOHN STUART, whereby on an adjourned summons his Honor decided that the respondent Thomas Armston was entitled to a sum of 147*l.* standing in Court in the above matters, and ordered the appellant to pay the costs of the application.

The 147*l.* in question was the balance which, after satisfaction of their mortgage debt, certain mortgagees of Thomas Armston, who

had sold the mortgaged estate under their power of sale, had paid into Court in the above matters under the Trustee Relief Act, 10 & 11 Vict. c. 96, by reason of the appellant's disputing Thomas Armston's right to receive it. The summons was taken out by Thomas Armston, and sought payment of the money to him. The Vice-Chancellor ordered accordingly, and the Lord Justices upheld this decision. The remaining question was as to the propriety of the order as to costs.

Mr. Bacon and *Mr. W. Pearson* appeared for the appellant, and contended that the Court had no jurisdiction to make the order which it had made as to costs. The Act was silent on the point, and *Re Woodburn's Will (a)* was no authority in support of the present order.

* *Mr. Malins* and *Mr. Welford*, for Thomas Armston. * 455

Mr. Osler, for the mortgagees.

Their Lordships held that the Court had jurisdiction to make the order which it had made as to costs, and that it had rightly made that order. Funds paid into Court under the Trustee Relief Act were so paid in trust to attend the orders of the Court, and therefore became subject to the general jurisdiction of the Court, which included a power to order the payment of costs. The case must be dealt with as on an interpleader bill filed by the mortgagees as stakeholders, the costs of which would have to be borne by the unsuccessful claimant.

(a) 1 De G. & J. 333.

WILSON v. ATKINSON.

1864. July 2, 8. Before the LORDS JUSTICES.

On the marriage of a widow who had an illegitimate daughter, funds belonging to her were settled on trust for her for life for her separate use, without power of anticipation, with remainder to her appointees by deed or will, and in default of appointment for her absolutely, if she should survive her intended husband; but if she died in his lifetime the fund was to be held in trust for the persons who would have been entitled under the Statutes for the Distribution of the Effects of Intestates if she had died intestate and without having been married. And it was declared that her illegitimate daughter should for the purposes of that trust be deemed to be her lawful child. The settlement contained no express provisions for children or issue. The marriage having taken place, and the wife having died in the husband's lifetime, without lawful issue, and without having made any appointment under the power: *Held*, reversing the decision of the Master of the Rolls, that not the wife's next of kin, but her illegitimate daughter, was entitled to the trust funds.

THIS was an appeal by the infant defendant Jane Elizabeth Hogarth Atkinson from a decretal order of the Master of the Rolls, whereby his Honor declared that, according to the true construction of an indenture of settlement made on the marriage of Richard Wilson Simpson and Jane Simpson, the appellant was not, but the next of kin of Jane Simpson, viz., her mother the defendant Catherine Atkinson, and her sister the defendant Mary Ann Sherrin, the wife of the defendant Joseph Sherrin, were, entitled to the settled trust funds.

* 456 * The case in the Court below is reported in the 33d volume of Mr. Beavan's Reports. (a)

At the date of the marriage Jane Simpson was a widow, named Jane Wilson, and the appellant was her illegitimate daughter. The settlement in question, upon the terms of which the case arose, was an indenture dated the 26th of August, 1863.

Thereby it was declared that the trustees should stand possessed of the trust fund which with certain real estate was settled on the part of Jane Simpson, and the annual income thereof, upon trust after the marriage to pay the same to her for her life for her sole use, separate and apart from Richard Wilson Simpson or any

(a) Page 536.

other husband, without power of anticipation; and that subject thereto the trustees should stand possessed of the said trust fund in trust for such person or persons, for such interest or interests and generally in such manner as Jane Simpson, whether covert or sole, by any deed or deeds to be attested by one or more witness or witnesses, or by her last will and testament, or any codicil or codicils thereto, should appoint, and that in default of or subject to such appointment the trustees should stand possessed of the trust fund in trust for Jane Simpson absolutely in case she should survive Richard Wilson Simpson, her said intended husband; but in case she should die in the lifetime of Richard Wilson Simpson, her said intended husband, then "in trust for such person or persons as under the Statutes for the Distribution of the Effects of Intestates would have become entitled thereto at the decease of the said Jane Wilson, if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common and in the shares in * which * 457 they would have taken under the same statutes; and it is hereby declared that Jane Elizabeth Hogarth Atkinson, the daughter of the said Jane Wilson, shall for the purposes of this trust be deemed to be the lawful child of the said Jane Wilson."

The settlement contained no express provisions for children or issue.

Jane Simpson died without lawful issue on the 26th of September, 1863, having made no appointment of the trust fund or any part of it, and leaving her husband Richard Wilson Simpson surviving.

The bill was filed by the trustees in order to have the rights and interests of the appellant and the next of kin in the trust fund determined and declared.

Mr. Shebbeare appeared for the plaintiffs.

Mr. Selwyn and *Mr. Blackmore*, for the appellant. — The appellant is entitled to the trust funds in question. The construction put upon this settlement by the Master of the Rolls would exclude even legitimate children of Jane Simpson from participation in the trust funds. So to construe any marriage settlement is in itself unreasonable, and so to construe this particular settlement is simply to strike out as unmeaning the declaration as to the

status of the appellant. That declaration must be read in connection with the next-of-kin clause, which it immediately succeeds, and shows that that clause must be construed as intended to extend to children, and then the declaration in question puts the appellant into that category. Moreover, on general principles, the intention of the whole of the instrument must govern its construction: that intention was to exclude the marital *458 rights of *Richard Wilson Simpson and any future husbands of Jane Simpson, and nothing more; and the words "without having been married" must be construed as meaning either "without having been married to Richard Wilson Simpson, her then intended husband," or "without leaving a husband surviving her." *In re Norman*; (a) *Mitchell v. Colls*, (b) appealed to the House of Lords under the title of *Clarke v. Colls*; (c) *Day v. Barnard*. (d) The *dictum* of the Master of the Rolls also in *Pratt v. Mathew*, (e) as that case is reported in the Jurist, (g) that "the proper construction to put upon the words 'unmarried' or 'without having been married,' is to exclude the marital rights, and not any interest which the children might be entitled to," is expressly in our favour. It is true that in Mr. Beavan's Report (h) this expression of opinion is limited to the effect of the word "unmarried;" but his marginal note extends to both, which renders it probable that the Jurist report correctly represents what fell from the Court.

Sir Hugh Cairns and *Mr. Speed*, for the respondents, the defendants Catherine Atkinson and Joseph and Mary Ann Sherrin.

The decision of the Master of the Rolls is right, and the next of kin of Jane Wilson are entitled to the trust funds. That decision does not exclude the children of Jane Simpson from the operation of the settlement, for under that settlement Jane Wilson had a power of appointment, by means of which she could provide for them; and the declaration as to the *status* of the appellant *459 was merely intended to legitimize her for the purposes of any such appointment, so as to enable her to take thereunder together with lawful children. The words "this

(a) 3 De G., M. & G. 965.

(c) 9 H. L. Cas. 601.

(b) Johns. 674.

(d) 1 Dr. & Sm. 351.

(e) 22 Beav. 328; S. C. on appeal, 8 De G., M. & G. 522.

(g) Vol. 2, New Series, 364, 365.

(h) Page 334.

trust," in the declaration in question, do not refer to the immediately antecedent next-of-kin clause, so as to extend the operation of that to children,—to say nothing of the unlikelihood of children being provided for in that way,—but to the general provisions of the settlement. As to the argument from the intention, the words of the settlement are express and distinct; and according to a canon of construction, much commented on in *Clarke v. Colls*, (a) where the Lord Chancellor CRANWORTH and Lord WENSLEYDALE differed in their opinions, must not be warped unnecessarily. *Marquis Cholmondeley v. Lord Clinton*, (b) *Laird v. Tobin*. (c) They exclude, except as claiming under an appointment in their favour, even legitimate children of Jane Simpson from participation in the trust funds: and the appellant, an illegitimate child, but who, for the purposes of the trust, it is declared shall stand in the category of lawful children, is excluded also. Moreover, the words "without having been married" mean, and only mean, "a spinster." There is no authority for any other construction. In none of the cases cited on the other side were there the words in question: and as to those cases, *Day v. Barnard* (d) was a case of a will, and in all the others there was an intention to provide for, and a provision actually made for, the children of the intended wife, although not in every view of the case an exhaustive provision. As to the *dictum* attributed to the Master of the Rolls in the Jurist report of *Pratt v. Mathew*, (e) the circumstances of that case * show that if * 460 the *dictum* really fell from the Court it was quite *obiter*, and a discreet reporter would have suppressed it, as it is evident the Master of the Rolls did on perusing Mr. Beavan's report before its publication. Mr. Beavan's report of the Master of the Rolls' judgment must be taken as correct, and his marginal note corrected accordingly.

They also referred to *Smith v. Smith*. (g)

Mr. Selwyn, in reply.

Judgment reserved.

(a) 9 H. L. Cas. 601.

(b) 2 J. & W. 1, 84.

(c) 1 Mollooy, 548.

(d) 1 Dr. & Sm. 351.

(e) 2 Jur. N. S. 364, 365.

(g) 12 Sim. 317.

July 8.

THE LORD JUSTICE KNIGHT BRUCE. — This case raises a question of construction upon the settlement made on the marriage of Richard and Jane Simpson.

The words “and without having been married” are the part of that settlement upon which the difficulty arises; and the point which we have to determine is, whether these words ought to be read as signifying “without having been married to any one,” or “without leaving a husband living at her death,” or lastly, “without having been married to her then intended husband.”

The context forbids the first of these constructions; and this I think, even independently of the following declaration, viz., that the appellant should for the purposes of the preceding trust, which was for the next of kin, be deemed to be the lawful child of Jane Atkinson.

But this latter clause, in my judgment, constitutes an
 * 461 * effectual and binding provision to the benefit of which the appellant is entitled. Both provisions read together certainly give the appellant a right to the fund, and she appears to me accordingly entitled to succeed.

THE LORD JUSTICE TURNER. — I cannot agree with the decision of the Master of the Rolls.

All these trusts arise under one series of declarations in the instrument, and the whole must be taken together.

This consideration disposes of the argument, that by the terms of the trust for the next of kin of Mrs. Simpson, her lawful children would have been excluded, and that consequently the appellant also is excluded from taking. For this trust cannot be construed without taking into account the declaration immediately following; and there would be no meaning in that declaration, which is to the effect that the appellant for the purposes of the trust for next of kin should be deemed a lawful child, if lawful children themselves could not have taken under that trust. That declaration must therefore, being taken in connection with the trust for the next of kin, be considered to explain the latter to refer to children as well as other next of kin.

Even if it be necessary to construe the terms of the trust for the next of kin independently and without qualifying them by the

subsequent declaration, still in my judgment the trust for the next of kin ought not to be so construed as to exclude children.

In either view the appellant is entitled to the funds in question.

* GARRETT v. THE BANSTEAD AND EPSOM DOWNS * 462
RAILWAY COMPANY.

1864. July 28. August 1. Before the LORDS JUSTICES.

By a contract between a contractor and a railway company, under which the former was to execute the company's works, it was provided (amongst other things) that surplus chalk should be the contractor's property, and that if the contractor should in the judgment of the company's engineer fail in the due performance of the contract, the engineer might, by order of the board of directors, take the further performance of the contract out of the contractor's hands, and employ for the purposes of the contract such persons and on such terms and conditions as the engineer should think fit. In alleged exercise of the power conferred by the latter provision the company resumed possession, and took the further performance of the contract out of the contractor's hands, who thereupon filed a bill for an injunction, alleging impropriety of conduct and duress on the part of the engineer, and that the chalk taken would, upon the completion of the works, become the plaintiff's property as surplus, — allegations the truth of which were *bond fide* disputed by the company: *Held*, that the contract being one where, if the company was wrong, the contractor could be amply compensated in damages, whereas if the contractor were allowed to resume work, the Court could not enforce specific performance of the contract in order to compel the completion of the works, the contractor was not entitled to an interlocutory injunction.¹

THIS was an appeal by the defendants, the Banstead and Epsom Downs Railway Company and the London, Brighton, and South Coast Railway Company, from the grant by his Honor the Vice-Chancellor Sir John STUART, on the motion of the plaintiff, the present respondent, of an injunction restraining the appellants from interfering with him in the execution of certain works which were being carried on by him under a contract between him and the first-named appellants, and from removing from the works any chalk, plant, and materials.

¹ *Munro v. The Wivenhoe, &c. Railway Co.*, *post*, 723, and notes to that case; *Jacomb v. Knight*, 3 De G., J. & S. 533, 538, note (1) and cases cited.

On the 6th of May, 1853, the respondent entered into a contract with the first-named railway company, whose undertaking was afterwards amalgamated with that of the other appellants, the London, Brighton, and South Coast Railway Company, for the construction of the Banstead Company's works.

The contract in question provided, amongst other things, *463 that the respondent should purchase the land *requisite for the railway; that all surplus land, chalk, and flints should be his property; that he would make and finish the railway in conformity with the plans provided by and to the satisfaction of the company's engineer for the time being, and would observe the engineer's directions with respect to the performance of the contract; and that all materials and plant provided by the respondent for the purposes of the contract and brought on the company's land should be the property of the company.

In its 13th clause the contract provided, that if the respondent should become bankrupt, or notoriously insolvent, or should in the judgment of the company's engineer for the time being fail in the due performance of the contract, the company's engineer might, by order of the board of directors, take the further performance of the contract out of the respondent's hands, and might employ for the purposes of the contract such persons and on such terms and conditions as the company's engineer for the time being should think fit, and the expenses to be thereby incurred on the part of the company were to be certified by the company's engineer for the time being, and to be paid by the respondent to the company.

The contract further provided, that all questions between the company and the respondent should be referred to the defendant Mr. Banister, or him failing to another person therein mentioned; that the company would pay the respondent for the complete performance by him of the contract 70,000*l.*, by certain instalments, and upon production by him of certificates given from time to time by the company's engineer, specifying the value of the work done by the respondent to the engineer's satisfaction.

*464 *The bill alleged that the respondent had been delayed in the execution of his contract by the conduct of the company; that the defendant Mr. Banister, who was the engineer of the company, had unfairly and improperly neglected to measure and inspect the work done by the respondent under the contract,

and had refused to grant him certificates in accordance with the terms of the contract; that the defendant Mr. Banister had also proceeded improperly to put in force the 13th clause of the contract, and had violently taken possession of the works which the respondent was carrying on; and that the defendants had removed from the works a quantity of chalk, which would upon the completion of the works become the property of the respondent as surplus.

The bill prayed in effect — (1) a declaration that the defendant Mr. Banister was incapacitated by his conduct towards the respondent from acting as arbitrator under the contract; (2) an injunction to restrain the appellants from taking possession of or interfering with the respondent in the execution of the works which were being carried on by him under the contract, and from removing from the works any chalk, plant, or materials; (3) an account of sums due to the respondent under the contract; (4) an inquiry as to surplus land, chalk, and flints; (5) damages; and (6) general relief.

Mr. Bacon and *Mr. Fitzhugh* appeared for the respondent, and

Mr. Rolt and *Mr. Taylor*, for the appellants.

Waring v. The Manchester, Sheffield, and Lincolnshire Railway Company (a) was referred to.

* THE LORD JUSTICE KNIGHT BRUCE. — There may possibly be a case in which the propriety of an injunction of the nature and to the extent here asked for in the position in which these parties are, and the relation in which they stand to one another of contractor and railway company, may be, although I cannot at present conceive a case in which it could be, free from question. But to suppose, in a case like this, where, if the company are wrong, ample compensation in damages may be obtained by the contractor, that the company are liable to have a person forced on them to perform these works, to whom they reasonably or unreasonably object, whereas there would be no reciprocity if the wrong were on the other side for the purpose of compelling the

(a) 7 Hare, 482; S. C. on appeal, 2 H. & T. 250.

performance of the works, is more than I am able to do. In my judgment, without entering into the merits of the case, and expressly without prejudice to any question, the injunction should be dissolved.

THE LORD JUSTICE TURNER. — In my judgment also this injunction should be dissolved.

The ground upon which the injunction was granted was, that the company will, if not restrained from so doing, improperly interfere with the contractor by resuming possession of the works and themselves undertaking to complete the contract; and it was not intended to decide whether the contract on the part of the contractor was duly observed or not.

This is not the time to give any final opinion upon that * 466 subject. It is, however, worthy of remark that, on * the 12th of April, 1864, the contractor wrote representing that the railway would be ready to open in three weeks: possession was not taken by the company until the beginning of the second week in July, and yet the railway was not completed by the contractor between the 12th of April, 1864, and the time when possession was taken. Circumstances may possibly exist in the case to account for that fact; explanations may possibly be capable of being given on the part of the contractor to show that there was no delay on his part in completing the contract, but that the delay arose from some acts done on the part of the company. In any event, however, this is clear, that it is a question, and a *bond fide* question, between the plaintiff and the company, whether this contract has or has not been duly observed on the part of the plaintiff.

That, in my judgment, brings the case into this position: if the contract has not been duly observed, then, under its 13th clause, the company has a right to take the further performance of the contract out of the contractor's hands; but it is now a question of doubt whether the contract has been duly observed or not.

Then comes the question of comparative injury; whether the greater injury would be done to the contractor by taking the contract out of his hands, and the railway company themselves completing it, or whether the greater injury would be done to the railway company by allowing the contractor to continue the completion of his contract.

Upon this question of comparative injury I entertain no doubt

whatever. If, on the one hand, the possession is given back to the contractor, and he is to be allowed to complete his contract, and he does not complete it, or * completes it in an * 467 improper and insufficient manner, this Court has no power to interfere; it cannot see to the due completion of a contract of this kind. If, on the other hand, the contractor is improperly disturbed and turned out by the railway company, he has a perfect and sufficient remedy in damages against the company.

I had at one time, during the argument, some doubt upon the question about the chalk; but that doubt was removed by my own consideration, and from what *Mr. Taylor* read from the affidavits. The chalk may be — I give no opinion whether it is so or not — surplus chalk within the meaning of the contract; but even on that assumption, still as the company had to take possession and the further performance of the contract out of the plaintiff's hands, they must have the line on which the railway is made in their possession; they must, therefore, take the chalk out, and it must be removed for the purposes of the contract. Therefore I think the injunction fails equally as to the chalk, and, upon the facts of the case, as also happened in *Waring v. The Manchester, Sheffield, and Lincolnshire Railway Company*, (a) must be wholly dissolved.

(a) 7 Hare, 482; 2 H. & T. 250.

* 468 * In the Matter of The COMPANIES ACT, 1862,

AND

In the Matter of The No. 3 MIDLAND COUNTIES BENEFIT BUILDING SOCIETY.

1864. July 2. Before the Lord Chancellor Lord WESTBURY. July 29.
August 3. Before the LORDS JUSTICES.

The Court of Chancery has jurisdiction to wind up a benefit building society under the Companies Act, 1862.

Per the Lord Justice TURNER: Benefit building societies are quite distinct from friendly and also from industrial or provident societies, and are not affected by the provisions of the statutes regulating the latter two classes of companies.

Circumstances under which a petition of rehearing was received on the signature of one counsel only.¹

THIS was an appeal by William Blaxland from the refusal of the Master of the Rolls to make an order upon the appellant's petition for winding up the No. 3 Midland Counties Benefit Building Society under the Companies Act, 1862.

His Honor was of opinion that the proper course to pursue, with a view to the winding up of the society, which was established in October, 1854, under the Stat. 6 & 7 Will. 4, c. 32, and had not been registered under any Act, was to register it under the Industrial and Provident Societies Act, 1862, and proceed in the County Court, as provided by sect. 17 of that Act.

The appellant was a creditor of the society for less than 500*l.*; and it was alleged that the society was insolvent, as also were many of its members. With a view, therefore, to save expense, one counsel only had appeared in support of the petition in the Court below; viz., *Mr. Springall Thompson*, who now applied to have the petition of rehearing received upon his signature only, citing *Knowles v. Greenhill*, (a) *Buckeridge v. Whalley*. (b)

The Lord Chancellor acceded to the application, the signature being that of the counsel who had argued the case at the former hearing.

(a) 3 De G., F. & J. 713.

(b) 4 De G., F. & J. 363.

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1479.

July 29.

* The petition of rehearing now came on to be heard * 469 before the Lords Justices.

Mr. Springall Thompson appeared for the appellant, and

Mr. Swanston, for the society.

The arguments turned mainly upon the provisions of the Industrial and Provident Societies Act, 1862, and the Companies Act, 1862, §§ 81, 99; and reference was also made to Stat. 6 & 7 Will. 4, c. 32, § 4; 18 & 19 Vict. c. 63, and also to the following cases:—*Re The St. George's Building Society*, (a) *Re The Alfreton District Friendly and Provident Society*, (b) *In re The Western Benefit Building Society*, (c) *Re The Doncaster Permanent Benefit Building and Investment Society*, (d) *In re The Sheffield and Hallamshire Co-operative Society*, and *In re The Chatham Co-operative Industrial Society (Limited)*, (e) *In re The Sherwood Loan Company*. (g)

At the close of the arguments, to which, in the view taken by the Court, it is not necessary further to advert, their Lordships reserved their judgment, the Lord Justice TURNER remarking, however, that he did not feel much doubt as to the society being a company within the meaning of the Companies Act, 1862.

August 3.

THE LORD JUSTICE KNIGHT BRUCE. —It may possibly be a proper interpretation of the statutes which have been discussed, to hold that there * is an existing jurisdiction in this matter * 470 in the County Court. But at any rate, jurisdiction exists, in my judgment, in this Court, and I think that the petition should be restored.

THE LORD JUSTICE TURNER. — This is an appeal from a decision of the Master of the Rolls. His Honor dismissed the appellant's petition on the ground that this society ought to be wound up under the Industrial and Provident Societies Act, 1862, in which case the jurisdiction would be in the County Court.

I assume (without giving any opinion as to whether it is so or

(a) 4 Drew. 154.

(b) 11 W. R. 301.

(c) 33 Beav. 368.

(d) 11 W. R. 459.

(e) 33 L. J. (N. S.) Ch. 737.

(g) 1 Sim. N. S. 165.

not) that the Industrial and Provident Societies Act ought to be applied to every company capable of being registered under that Act. Still, in my judgment, benefit building societies are quite distinct from friendly and also from industrial or provident societies, and are not affected by the provisions of the statutes regulating the latter two classes of companies. I am confirmed in this conclusion by a note from the registrar of friendly societies, in which he states that the Industrial and Provident Societies Act, 1862, does not include benefit building societies, and adds, that the Industrial and Provident Societies Act is applicable only to societies, the object of which is combination for labour or trade.

There must be an order for winding up the society under the Companies Act, 1862. The appellant and the members of the society will have their costs of the petition and of the appeal out of the estate.

* 471 * In the Matter of The COMPANIES ACT, 1862, and

In the Matter of The EXHALL COAL MINING COMPANY LIMITED.

MILES'S CASE.

1864. November 3. Before the LORDS JUSTICES.

An applicant for shares in a joint-stock company signed a form of acceptance for 200, and gave one of the directors a check for the amount of the first call upon them. Before the check was paid into the company's bankers, the applicant had expressed to the director in question his desire to limit his liability to fifty shares, and the check was paid in with that intention. The bankers' receipt expressed (by accident, as was alleged) a payment in respect of 200 shares. At the next meeting of directors the payment of 500*l.* was [agreed to be treated as a payment in full of fifty shares, the remaining amount on the 150 shares for the present to remain in abeyance, and a certificate of such fully paid-up shares was delivered to the applicant in exchange for the bankers' receipt, which the applicant accordingly gave up. No certificate or letter of allotment was ever made by, nor was any call ever made upon or dividend paid to, the applicant in respect of the 150 shares: he received a dividend in respect of the fifty shares only. Subsequently, finding his name on the register for 200 shares, he protested, and it was resolved that the 150 shares should be cancelled, as no calls were paid. The company being ordered to be wound up: *Held*, that the applicant was liable as a contributory for fifty shares only.

THIS was an appeal by the official liquidator of The Exhall Coal Mining Company Limited, a company constituted under the Joint-stock Companies Act, 1856, from an order made by the Master of the Rolls upon an adjourned summons in the winding up of the company under the Companies Act, 1862, whereby his Honor held the respondent Henry Miles to be a contributory for fifty instead of two hundred shares in the company, for which latter number the appellant had put him on the list.

The following were the facts of the case:—

In March, 1862, the respondent was induced by a Mr. Malcolm, one of the directors of the company, to become a shareholder; and on the 10th of that month he signed a form of acceptance of two hundred shares of 10*l.* each.

* On the 18th a call was made of 2*l.* 10*s.* per share, and * 472 thereupon the respondent gave a check for 500*l.* to Mr. Malcolm, who, on behalf of the respondent, paid it in to the account of the company at the bankers, and received from them the following receipt:—

“Received the sum of 500*l.* from H. Miles, Esq., being a call of 2*l.* 10*s.* per share on two hundred ten per cent preferential shares in this company.”

Before, however, the payment of the 500*l.* into the bank, the respondent had expressed to Mr. Malcolm his desire to limit his liability to fifty shares, and had requested that gentleman to assist him in so doing, and the check was paid into the bank with that intention. It was alleged on behalf of the respondent that the form in which the bankers' receipt was given arose from the fact of the bankers not having at hand at the moment any forms of receipts adapted to the case of fully paid-up shares.

On the 25th of March, when the directors first met after the respondent's communication to Mr. Malcolm, that gentleman brought to their attention the respondent's desire to limit his liability, and the managing director made the following entry in the minute-book of the company:—

“Mr. Malcolm, on behalf of Mr. Miles, requested, instead of paying the first call of 50*s.* per share on each of the two hundred shares allotted and accepted by that gentleman, to pay 500*l.*,

being the whole amount of fifty shares paid in full; the remaining amount on the one hundred and fifty shares for the present to remain in abeyance."

No communication of this entry was apparently made to the respondent, but on the 26th of March the managing director * 473 sent to Mr. Malcolm the usual certificate * for fifty paid-up shares, and the latter gentleman forwarded it to the respondent "in exchange for" the 500*l.* check previously received. The respondent, on his part, returned to the managing director the bankers' receipt.

No certificate or letter of allotment was ever received by, nor was any call ever made upon or dividend paid to, the respondent in respect of the other 150 shares. A dividend upon the fifty shares alone was received by him.

In the beginning of 1863 the respondent discovered that his name had been entered on the register as a holder of 200 shares, whereupon he wrote thus to Mr. Malcolm:—

"I shall be anxious till I have my name erased from the Exhall share list from 2000*l.* shares to 500*l.*, viz., fifty paid in full shares, which you handed me last March, 1862, when you also assured me that I had nothing more to pay, and that the transaction and the responsibility were confined to that. I did not ask you if you had put me right on the register, because I concluded you had. I must now ask you to do so, and to have the goodness to write me word, either through the secretary or by yourself, that I am on the register for fifty shares paid in full and no more."

This letter was passed on to the managing director, and by him a promise was made to the respondent that it should be laid before the directors at their next meeting.

On the 14th of April, 1863, accordingly, it was resolved, that "the 150 shares be forfeited, as no calls are paid."

* 474 * This resolution was communicated by the managing director to the respondent, who thereupon desisted from further action in the matter.

The 150 shares never having been disposed of or allotted to any other person, and the company being on the 24th of February, 1864, ordered to be wound up, the official liquidator settled the

respondent on the list of contributories for 200 shares. The Master of the Rolls, however, by the order under appeal, decided that he was only a contributory in respect of fifty shares.

Mr. Southgate and *Mr. Wickens* appeared for the appellant, and

Mr. Selwyn and *Mr. Roxburgh*, for the respondent.

On behalf of the appellant it was contended, that even if the respondent had changed his mind with reference to the amount of shares which he wished to have, he had not done so until he had become actually the holder of 200 shares, for which he was accordingly liable to be put on the list of contributories. It could not be contended that the 150 shares were cancelled, for nothing short of an unanimous decision of the company could have accomplished that. Nor could it be contended that they had been effectually forfeited, as the provisions of the Joint-stock Companies Act, 1856, had not been followed.

Reference was made to *In re The Vale of Neath and South Wales Brewery Joint-stock Company, Ex parte Morgan*, (a) *In re The Athenæum Life Assurance Society, Richmond's Case*, (b) and 19 & 20 Vict. c. 47, § 9, Table B., §§ 15-19.

* On behalf of the respondent, it was contended that the * 475 strongest point against him was the form of the bankers' receipt; but that was explained by the accident above referred to, and was at any rate cured by the subsequent delivery to him by the company's officer of the certificate for fifty fully paid-up shares. That being so, the facts of the case sufficiently showed he was under no liability in respect of the 150 shares. If he were under any liability now, he must always have been under such liability, and yet the company had never sought to enforce it against him; and as they had never done so, the official liquidator was bound by their laches, promptitude being of the very utmost importance, where mining property was concerned.

Reference was made to *Prendergast v. Turton*. (c)

(a) 1 De G. & Sm. 750; 1 Mac. & G. 225.

(b) 4 K. & J. 305.

(c) 1 Y. & C. C. C. 98; 13 L. J. (N. S.) Ch. 268.

THE LORD JUSTICE KNIGHT BRUCE. — This is a contest between form and substance, in which the Master of the Rolls has decided, and I think rightly decided, in favour of substance against form.

There is no doubt that the respondent changed his views as to the number of shares he would take. The question is, whether such his change of mind was communicated in time and duly, or whether previously he had become bound to take 200 shares.

In my judgment, before he became so bound, legally or equitably, his change of intention existed, and had been duly communicated. In my judgment, he was never the owner of more than fifty shares, and consequently the present appeal is entirely without ground.

* 476 * **THE LORD JUSTICE TURNER.** — I am of the same opinion.

There is no taint of dishonesty in the case. If this gentleman be made liable for the whole 200 shares, such a result would be clearly contrary to his intention at the time of the transaction. And, indeed, apart from the banker's receipt, there is nothing to charge him in respect of more than fifty shares. It was Mr. Malcolm who paid the 500*l.* into the bank, and who took the receipt for it. But before that money was so paid in, there had been an interview between the respondent and Mr. Malcolm, at which the respondent expressed his wish to have no more than fifty shares allotted to him; and the money was paid with that intention. The company appears to have assented to this view of the whole transaction, as is shown by a dividend having been paid upon the fifty shares only. The resolution which it passed for the forfeiture of the remaining shares, if inoperative in itself, was a device adopted by it for setting the matter right.

Appeal dismissed with Costs, the question whether they were to be paid out of the estate or not being remitted to the Court below.

* *Ex parte* CHARLES BENJAMIN GORELY. * 477

In the Matter of JOHN BARKER, a Bankrupt.

1864. November 9, 10. Before the Lord Chancellor Lord WESTBURY.

The 83d section of the 14 Geo. 3, c. 78, is of universal and not of locally circumscribed application, but only applies to insurance moneys upon houses and buildings.

Moneys paid in respect of the insurance of trade fixtures are not within its application.

THIS was an appeal by Charles Benjamin Gorely, the owner of certain property at Dover, of which the bankrupt John Barker was the lessee, and by certain mortgagees of the lease, from the decision of Mr. Commissioner GOULBURN on certain questions submitted to the Court upon a special case under the provisions of the Bankruptcy Act, 1861, § 56.

The precise terms of these questions it is not necessary for the purposes of this report to refer to in detail. It is sufficient to say that they had reference to the mode in which, as between the various parties to the appeal, were to be applied certain moneys which had been paid by certain insurance companies partly in respect of the demised property which had been burnt down, and partly in respect of certain trade fixtures upon the property which had been burnt with it, such fixtures having been provided by the bankrupt, and he being, under one of the covenants in his lease, bound to deliver them up to the lessor on the determination of the lease.

The main question argued was upon the construction of the preamble to and the 83d section of the Stat. 14 Geo. 3, c. 78, which are respectively set out below, (a) and the * Stat. * 478

(a) Stat. 14 Geo. 3, c. 78, preamble: "Whereas, an Act of Parliament, made and passed in the twelfth year of his present Majesty's reign, intituled, an Act for the better regulation of buildings and party-walls within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places in the weekly bills of mortality, the parishes of Saint Mary-le-bon and Paddington, Saint Pancras, and Saint Luke, at Chelsea, in the county of Middlesex; and for the better preventing of mischiefs by fire within the said cities, liberties, parishes, precincts, and places; and for amending and reducing the laws relating thereto into one Act, and for other

7 & 8 Vict. c. 84, and 18 & 19 Vict. c. 122, so far as they respectively except from the general repeal of the Statute of 14 Geo. 3, the 83d section thereof.

* 479 * *Mr. F. Meadows White* for the appellants, referring to Stat. 12 Geo. 3, c. 73, § 34, and *Filliter v. Phippard*, (a) *Simpson v. The Scottish Union Insurance Company*, (b) and *Richards v. Easto*, (c) contended that, notwithstanding the locality of the property, they were entitled to the benefit of the Stat. 14 Geo. 3, c. 78, § 83, which he argued was of universal and not of locally circumscribed application, and thereunder to have the whole of the moneys in dispute laid out in rebuilding the property.

Mr. Holl, for the respondents the creditors' assignees, referring purposes, hath been found insufficient to answer the good purposes intended thereby; and whereas it may tend to the safety of the inhabitants and prevent great inconveniences to builders and workmen employed in buildings within the said cities, liberties, parishes, precincts, and places, if the regulations contained in the said Act were repealed, and other regulations and provisions respecting such buildings were established by law: " . . .

Sect. 83. " And in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered; be it further enacted by the authority aforesaid, That it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorized and required, upon the request of any person or persons interested in or entitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings, have been guilty of fraud or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings, are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively."

(a) 11 Q. B. 347. (b) 1 H. & M. 618. (c) 15 M. & W. 244.

to Stats. 14 Geo. 3, c. 78, § 84, and 7 & 8 Vict. c. 84, and to *Vernon v. Smith*, (a) *Dumergue v. Rumsey*, (b) *Poole's Case*, (c) and *Amos on Fixtures*, (d) in support of the order under appeal, contended that the section in question had no application beyond the metropolitan district, and that the moneys in dispute belonged to the bankrupt's estate.

Mr. Meadows White, in reply to a question of the Lord Chancellor, who drew a distinction between the moneys paid by the offices for the insurance of the house and buildings, and the moneys paid by them for the insurance of the fixtures, and in support of the right of the appellants to the latter moneys also, referred to *Gibson v. Hammersmith and City Railway Company*, (e) *Walmsley v. Milne*, (g) *Ex parte Broadwood*, (h) *Ex parte Lloyd*, (i) and *Leader v. Homewood*. (k)

* THE LORD CHANCELLOR. — The first question depends * 480 upon the inquiry whether the 83d section of the 14 Geo. 3, c. 78, is of universal application, or whether it is to be limited to houses and buildings standing within the limit of what is commonly called the metropolitan district.

This 83d section is not re-enacted as an integral part of the more recent Metropolitan Building Acts, but whereas those Acts repeal the former Act, they except and take out of the operation of that repeal certain sections of the previous Act, and among them the 83d. That 83d section, therefore, remains in all its integrity by virtue of that Act. This is material, because power is given by the Metropolitan Building Acts to apply them to other districts than the metropolitan district, — a power which, so far as I am aware, has not been exercised with regard to the district in which this house is situated; and consequently, where a house falls within the description of a house within the meaning of the Statute 14 Geo. 3, c. 78, it must be by force of that particular enactment taken by itself.

The construction, then, of the Statute of the 14 Geo. 3 must be considered.

(a) 5 B. & Ald. 1.

(b) 2 H. & C. 777.

(c) 1 Salk. 368.

(d) Page 321, 2d ed.

(e) 2 Dr. & Sm. 603.

(g) 7 C. B. (N. S.) 115.

(h) 1 M. D. & De G. 631.

(i) 3 Deac. & C. 765.

(k) 5 C. B. (N. S.) 546.

A preamble affixed to the whole statute limits its applicability within certain local boundaries, and the sections which precede the 83d almost all contain enactments, carefully worded, to extend only to the districts within the limits defined in the preamble.

But when we approach the 83d section, we find, in the first place, that the enactment therein contained is heralded by
 * 481 a particular preamble of its own, which * recites a general and universal evil as being the occasion of its being passed. We should be prepared, therefore, to infer, from the statement in that preamble of a general evil which the legislature was desirous to redress, this consequence, viz., that the enactment would, in fact, be coextensive with the evil stated to have been intended to be redressed; and, in point of fact, that general inference is confirmed by the language of the enactment itself, which is in itself general, and does not contain the words, "within the limits aforesaid;" words which were evidently omitted, and omitted designedly.

In my judgment, therefore, this particular section is intended to be of general and universal application; nor does it lose its universality because it does not happen to contain the words found in the 84th section, "whether within the limits aforesaid or elsewhere, within the kingdom of Great Britain," words redundant and pleonastic, but the insertion of which in the 84th section and the non-insertion of which in the 83d section furnished ground for one portion of *Mr. Holl's* argument. This conclusion, however, I need not labour, settled as I think it has, in effect, been by the case of *Filliter v. Phippard*. (a) And having arrived at the conclusion that the 83d section of the Act of 14 Geo. 3, c. 78, applies to the present case, it follows that I must hold the insurance money upon this particular house applicable, for the benefit of the lessor, to the purpose of reinstating the premises.

But there still remains another and a somewhat difficult question, what is to be done with reference to the insurance moneys paid in respect of fixtures.

* 482 * The demise of this public-house to the lessee was accompanied by a covenant, on the part of the latter, that he would leave upon the premises the fixtures put up by him during the term. The covenant would relate only to those fixtures which might be found upon the premises upon the determination

(a) 11 Q. B. 347.

of the term. The term is so created as to determine either by expiration of time or by a particular event, namely, the bankruptcy of the lessee. The facts are these; viz., that, pending the lease, the tenant not only insured in the manner to which I have already adverted, but he effected a separate and distinct insurance upon the fixtures. A fire took place whilst the lease was subsisting, and the fixtures then upon the premises were destroyed.

The Act of Parliament which we have to construe only applies to insurance money and losses with respect to houses and buildings, and the extent of these words, "houses and buildings" may be in some measure collected from the rest of the section, which gives to the insurers the right, and puts them under the obligation, of applying the money in the "rebuilding, reinstating, or repairing" of "houses or other buildings." The question, therefore, comes to this: when this fire happened were the fixtures in such a state in the eye of the law, as that, if the lessor had made a conveyance of the freehold and the deed had used only such parcels as these, "all those houses and buildings," the fixtures in question would have passed under that conveyance?

These fixtures were admittedly trade fixtures, and would, therefore, by the ordinary rule, have been removable by the tenant at the time when the fire took place. The only mode in which the right to remove them could * have been affected was * 483 by the operation of the covenant of the tenant himself, who had covenanted to deliver up the premises with the fixtures upon the determination of the lease. The lessor, therefore, had a contingent future right, which would arise to him by virtue of present contract, to the possession of these fixtures; and, inasmuch as the ownership of the fixtures, at the time when the event happened which gave rise to the intervention of the power contained in the statute, remained in the lessee, the right of the lessor at that time was a personal right depending upon contract and not a real right depending upon ownership.

In my judgment, therefore, if, at the moment before the destruction took place, the lessor had made a conveyance of the house, the fixtures in question would not have passed as being a member thereof or appurtenant thereto; and that being so, I think that this insurance money does not fall within the operation of the 83d section, but has constantly remained the personal property of the lessee, and therefore passed to the assignees.

1864. July 16. November 14. Before the Lord Chancellor Lord WESTBURY.

In the administration of charitable bequests it is the duty of the Court to ascertain from the words of the will, by the ordinary rules of construction, the true meaning and intention of the testator, both as to the bequest itself and the mode of carrying it into effect, without in the first instance advertent to the existence of the Statute of Mortmain.

When the intention of the testator has been ascertained, inquiry is to be made whether the whole or any part of that intention is contrary to the provisions of the statute. But no secondary interpretation ought to be adopted, nor ought the Court to resort to any different mode of administration from that indicated by the testator, even though it may be reasonable in itself, for the purpose of escaping from the operation of the statute.

The Attorney-General v. Williams (2 Cox, 387) followed and approved.

A gift to The Society for the Prevention of Cruelty to Animals, to be applied as the committee should "think best, towards the establishment in the neighbourhood of London or Westminster of slaughter-houses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered:" *Held* void, as being within the Statute of Mortmain, 9 Geo. 2, c. 36.¹

THIS was an appeal on the part of the persons interested in the residuary estate which, under a power contained in her marriage settlement, was appointed by the will and codicils of the Viscountess D'Alté, from a decision of the Vice-Chancellor Wood, upholding the validity of the bequest herein after referred to, notwithstanding the provisions of the Mortmain Act, Stat. 9 Geo. 2, c. 36.

By the conjoint effect of the will and one of the codicils referred to, dated respectively the 4th of September, 1848, and the 28th of February, 1852, the testatrix, who was an English lady married to a Portuguese nobleman, and who died in September, 1862, gave a sum of 10,000*l.* consols, to the treasurer for the time being of the society called the Royal Society for the Prevention of Cruelty to Animals, established in 1824, "to be at the disposal of
* 485 the committee for the time * being of that society; and it
it is my express wish that this sum and the dividends

¹ See 2 Wms. Ex'rs (7th Eng. ed.) 1062 *et seq.*; *In re Clancy*, 16 Beav. 295; *Hawkins v. Allen*, L. R. 10 Eq. 246; *Sinnett v. Herbert*, L. R. 7 Ch. Ap. 232.

thereof be applied by the said committee in such manner as they shall think best towards the establishment in the neighbourhood of London or Westminster of slaughter-houses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered."

The society in question was not incorporated, and it had no license to hold land in mortmain.

Mr. Rolt and *Mr. Cotton*, for the appellants, referring to *The Attorney-General v. Williams*, (a) *Dunn v. Bownas*, (b) *The Attorney-General v. Hull*, (c) *The University of London v. Yarrow*, (d) *Longstaff v. Rennison*, (e) *Edwards v. Hall*, (g) *The Church Building Society v. Barlow*, (h) and *Carter v. Green*, (i) contended that the testatrix's will, construed by itself and apart from any consideration of the existence or effect of the Statute of Mortmain, must be the guide as to whether the acquisition of land for the purposes of the bequest in question was necessary: that such acquisition was, upon the true construction of the testatrix's will, necessary: and that the gift was, therefore, void under the statute.

Mr. Giffard and *Mr. Swanston*, for the Society, referring to *Sorresby v. Hollins*, (k) *Vaughn v. Farrer*, (l) *Johnston v. Swann*, (m) *Grafton v. Frith*, (n) *Philpott v. St. George's Hospital*, (o) supported the Vice-Chancellor's decision. * 486

Mr. W. M. James, *Mr. Wickens*, and *Mr. Goren* appeared for the other parties.

At the close of the arguments the Lord Chancellor reserved his judgment.

(a) 2 Cox, 387.

(b) 1 K. & J. 596.

(c) 9 Hare, 647.

(d) 1 De G. & J. 72.

(e) 1 Drew. 28.

(g) 11 Hare, 1.

(h) 3 De G., M. & G. 120.

(i) 3 K. & J. 591.

(k) 9 Mod. 221.

(l) 2 Ves. Sen. 182.

(m) 3 Madd. 457.

(n) 15 Jur. 737.

(o) 6 H. L. Cas. 338.

November 14.

THE LORD CHANCELLOR. — In the administration of charitable bequests, it is the duty of the Court to ascertain, from the words of the will by the ordinary rules of construction, the true meaning and intention of the testator, both as to the bequest itself and the mode of carrying it into effect, without, in the first instance, advert- ing to the existence of the Statute of Mortmain.

When the intention of the testator has been ascertained, inquiry is to be made whether the whole or any part of that intention is contrary to the provisions of the statute. 'But no secondary inter- pretation ought to be adopted, nor ought the Court to resort to any different mode of administration from that indicated by the testa- tor, even though it may be reasonable in itself, for the purpose of escaping from the operation of the statute.

All this is well and concisely expressed by the Lord Chan-
* 487 cellor in the case of *The Attorney-General v. Williams (a)* in these few words : "The Court will not alter its concep- tion of the purposes of a testator merely because those intentions happen to fall within the prohibitions of the Statute of Mortmain."

I have thus stated the rule, because I find in the note which has been furnished me of the Vice-Chancellor's judgment in the pres- ent case, and in the reports of previous cases, words attributed to the learned Judges which do not appear to me to express the rule quite accurately.

I proceed to consider what is the intention of the testatrix in the present bequest, and what, but for the Statute of Mortmain, would be the mode of giving effect to that intention in this Court.

The will directs that the money shall be applied towards the establishment in the neighbourhood of London and Westminster of slaughter-houses away from the densely populated places in which they are now situated.

The Vice-Chancellor appears to have made a distinction between "towards the establishment" and "in the establishment," but in my judgment a verbal refinement of so subtle a nature — a refine- ment which would not have been thought of but for the statute — ought not to influence my decision.

The word "establishment" involves the idea of putting the charity on a permanent footing. It points to the purchase of sites

(a) 2 Cox, 388.

of land and the erection of permanent buildings, and it cannot be doubted that if there were no Statute of Mortmain, a bequest, to establish a * charity, such as a school or a hospi- * 488 tal, in any parish or district would be carried into effect by the purchase of land and the erection of buildings thereon.

The Vice-Chancellor appears to have thought that in this case the purchase of land and the erection of buildings would be the worst plan of carrying the intentions of the testatrix into effect, because it was possible that in a few years the slaughter-houses, wherever situate, might be surrounded with houses and buildings. But such a consequence does not affect the question of the construction of the words of the bequest. I cannot give this bequest a different meaning or effect because the intention may be defeated by a possible event at a remote period, which the testatrix does not appear to have foreseen. That may tend to show that the testatrix was not provident, but cannot affect the meaning of her words, or justify the Court in substituting a different direction from that contained or involved in the language of the bequest. It might also be observed, if necessary, that the evil apparently apprehended by his Honor might be easily remedied, for if it happened that the slaughter-houses became surrounded by dwellings, the site and ground of the buildings would become so valuable, that they might be readily sold under the direction of the Court, and the money applied in the erection of other slaughter-houses in a more removed situation, and so from time to time.

His Honor again is stated to have observed that when the slaughter-houses are erected there will be no means of compelling the public to use them; but this again is an objection to the prudence of the gift, and cannot affect the interpretation of the words.

There are many cases on this subject, and some of * them are not easily reconciled with others, but I think * 489 there would not have been so much difficulty if the plain rule I have stated had been always adhered to.

In my judgment this bequest is wholly void by the operation of the Stat. 9 Geo. 2, c. 36, and the amount falls into the residuary bequest. The order of the Vice-Chancellor must be reversed. The costs will come out of the fund.

TROUP *v.* RICARDO.

1864. November 15, 17. Before the Lord Chancellor Lord WESTBURY.

The jurisdiction of the Court of Chancery is not ousted by a limited statutory jurisdiction conferred upon another Court, and is properly invoked where the purposes for which the limited jurisdiction is conferred are at an end, or where the limited jurisdiction is not equal to the comprehension of the matter in dispute, or can only be exercised on terms destructive of the right claimed.¹ An insolvent debtor's estate had been fully administered in the Insolvent Debtors' Court, and a sum paid out of Court to him as surplus; but he had obtained no order to annul the insolvency or to revest his property in him: *Held*, that he was nevertheless entitled to sue in Chancery, in order to impeach the dealings of his assignees in insolvency with his property.

Rochfort v. Battersby (2 H. L. Cas. 388) and *Dyson v. Hornby* (7 De G., M. & G. 1) distinguished.

Circumstances under which a demurrer for multifariousness was overruled.²

THIS was an appeal by the plaintiff from the allowance by the Master of the Rolls of a general demurrer to the bill for want of equity and multifariousness.

For the purposes of this report, and with the following additions, the allegations in the bill sufficiently appear from the Lord Chancellor's judgment, as does also the scope of the arguments.

The bill was not filed till 1864, although the transactions it sought to impugn ranged over a period of time beginning with the year 1844 and ending in the year 1862. The order made by the Insolvent Debtors' Court vesting the appellant's property * 490 in the provisional * assignee in insolvency was made in October, 1853. The assignees under the insolvency were appointed in November, 1854. The sale which the bill sought to set aside took place in 1855. A second vesting order in insolvency was made in respect of the appellant's property in 1856. The order made for the return of 850*l.* out of the Insolvent Debtors' Court to the appellant as surplus of his estate was made shortly before the abolition of the Insolvent Debtors' Court, and the appellant's application to the commissioner to annul the insolvencies, and the refusal of the Court so to do, unless the appellant would sign an undertaking to confirm all the proceedings

¹ Kerr Inj. 5, 6; *Lynn v. Neldon*, 8 C. E. Green, 169, 170, 171.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 334, and notes (1) and (2) 335, *et seq.*

that had been taken under them, — an undertaking which the appellant declined to enter into, the consequence being that no revesting order or order to annul the insolvencies was or could be obtained, — was in 1862.

Mr. Selwyn and *Mr. T. A. Roberts* appeared for the appellant, and

Mr. Baggallay and *Mr. Martineau*, for the respondents, the demurring defendants.

The following were the authorities referred to, viz. : —

On the part of the appellant, *Ex parte Bennett*, (a) *Wearing v. Ellis*, (b) *Ex parte Cook*. (c)

For the respondents, Stat. 1 & 2 Vict. c. 110, §§ 37, 44, 45, 47, 62, 63, 92, and the Bankruptcy Act, 1861, §§ 19, 23, 24; and *Tudway v. Jones*, (d) *Grange v. Trickett*, (e) *Kernot v. Pittis*, (g) *Anon.*, (h) *Wormald* * v. *De Lisle*, (i) *Westhead v. Keene*, (k) * 491 *Rochfort v. Battersby*, (l) *Dyson v. Hornby*, (m) *Heath v. Chadwick*. (n)

THE LORD CHANCELLOR. — Two causes of demurrer to this bill are assigned, — want of equity and multifariousness.

Let me first give a sketch of the nature of the suit, and dispose of the technical ground of demurrer, — that of multifariousness.

The plaintiff sues describing himself as an insolvent debtor, but he alleges that his estate is more than sufficient for the full discharge of all his debts, which he alleges have long since been fully paid; as evidence of which he brings forward the fact that 850*l.*, which was in the Insolvent Debtors' Court, has been ordered to be paid to him as surplus property. That statement upon demurrer must be taken to be true, and the fact is therefore strongly confirmatory of the general allegation of there being surplus property, and of the debts having been fully paid and discharged.

(a) 10 Ves. 381.

(b) 6 De G., M. & G. 596.

(c) 2 E. & E. 586.

(d) 1 K. & J. 691.

(e) 2 E. & B. 395.

(g) 2 E. & B. 421.

(h) 5 L. T. (N. S.) 403.

(i) 3 Beav. 18.

(k) 1 Beav. 287.

(l) 2 H. L. Cas. 388.

(m) 7 De G., M. & G. 1.

(n) 2 Ph. 649.

The case raised by the plaintiff, when reduced to any thing
 * 492 like a plain expression of it, (a) may be thus * defined:

that Ricardo is mortgagee of his estate; that the amount due to Ricardo is a small sum, but that by collusion and connivance between the assignees in the Insolvent Debtors' Court and Ricardo, the latter has been permitted to establish a large claim as mortgagee against his estate, amounting to upwards of 11,000*l*. He then alleges that some valuable property of his, consisting of houses and building land at Hastings, was put up for sale by the assignees in collusion with Ricardo and with the two demurring defendants, two of the purchasers; that the sale was so made as to carry into effect a previous agreement between those colluding parties, that the demurring defendants should become the purchasers at little beyond a nominal price; and that the agreement had been completed by a conveyance by the assignees and by Ricardo to the one who contracted to purchase, but who really so contracted on behalf of the three individuals at this pretended auction.

That is a case which, if established at the hearing, would entitle the plaintiff, supposing he had a *locus standi* in this Court, to a decree to set aside the sale, and also to prosecute the inquiry into the claim of Ricardo; because, as Ricardo had become the assignor of the purchasers, the purchasers would have the right, even if the contract to purchase were set aside, to stand in the place of Ricardo; and accordingly complete justice could not be done without first dealing with the question of sale, and then with the question what was the true amount of Ricardo's claim against the plaintiff, and what, therefore, should be paid to the purchasers, who, if the sale should be set aside, would be converted into mortgagees only, to the extent of the amount found due to Ricardo.

There is, therefore, in my judgment, a chain running
 * 493 * through the whole of the transaction, which links together Ricardo the mortgagee, the assignees, the several purchasers and the solicitor, who are charged to have been instruments for carrying this pretended and collusive sale into effect, and the

(a) It appeared during the progress of the arguments that a great deal of impertinent and improper matter had been introduced into the bill by the appellant after the draft of it had been signed by his counsel, — conduct which the Lord Chancellor severely stigmatized, intimating his intention of having any bill which in future came before him under such circumstances taken off the file.

objection for multifariousness cannot be sustained. The demurrer on that ground must be overruled.

Although there is much in the bill of an impertinent and improper character, and allegations which cannot be justified, which might furnish a reasonable ground of complaint, or for dealing with the question of costs to be allowed to the plaintiff at the hearing, yet I do not find that the impertinent matter renders the pertinent matter so obscure or so uncertain, that the Court could refuse to recognize a just cause of complaint in the bill, its allegations being taken as admitted. In the residue of the bill there would be sufficient to justify a decree if the allegations turned out to be well warranted by the evidence adduced at the hearing.

The main subject of argument, however, is this, has this plaintiff a *locus standi* in this Court?

Two facts distinguish this case from all others. There is the allegation of a large surplus after all the purposes of administration in the Insolvent Debtors' Court have been satisfied; so that that Court has no longer any duty to discharge, the creditors and claimants having been fully satisfied; and the rest of the case is one which not only shows that the plaintiff is entitled to his surplus property, but also raises an issue between him and the assignees, the officers of the Insolvent Debtors' Court; which that tribunal (if it still existed) would be incompetent to try.

*The forms of that tribunal preclude the defendants *494 from insisting that the plaintiff ought first to have gone to that tribunal and obtained a revesting order or an order for the assignees to account to him for the surplus property, because either application would have involved a recognition by the plaintiff of what had been done by the assignees. The issue raised by the plaintiff, that the assignees have fraudulently made away with his property at an undervalue, could not have been tried by the Insolvent Debtors' Court, because it would be necessary for the trial of that issue that the party to the asserted fraud, namely, the purchaser, should be present for the purpose of restitution; but the Insolvent Debtors' Court would have had no authority to convene that purchaser.

If it be said that an order ought to have been obtained from that Court to restore the surplus of the plaintiff's property, that very order would either in terms have been destructive of the

plaintiff's right, or by an antecedent proceeding involved this conclusion, that the plaintiff would not be allowed to obtain that order except on an account previously being taken and passed; which account would have involved, as a legitimate transaction by the assignees, the very fraudulent transaction which it is the object of this bill to impugn. To tell the plaintiff, therefore, that he must first have obtained a revesting order or an order to restore to him the surplus of his property, from a Court which would not have been competent to try the issue now raised, is simply to deny him justice by subjecting him to the necessity of coming under terms which would effectually prevent him from trying the issue in this Court or any other Court of competent jurisdiction.

The duty, then, of the Insolvent Debtors' Court being discharged when the debts and claimants are all satisfied,
*495 *there will then follow, upon universal principle, the equity that the property which remained undistributed, being no longer required for any function of that Court, falls under the general rule which raises on the part of the merely legal owner of property, no longer required for the purposes for which alone the assurance to him existed, a trust and obligation to restore the property to the original owner.

The surplus, then, of an insolvent's property is subject to the law of resulting trusts; and, although it may be thought fit, in an ordinary case, that he should take the account of the surplus property in the Court which has administered the other portion of the property, and that the amount of the surplus should be conclusively settled by the account taken in that Court, which would require for its officer a proper discharge on the part of the insolvent, yet if the complaint made against the officer of the Court be a complaint which the Court itself has no adequate jurisdiction to try, it follows, from the infirmity of the particular jurisdiction, that it would be a denial of justice to impose upon the insolvent the obligation of taking an order from the Court which would involve of necessity a discharge to the officer of the Court from that very complaint into the consideration of which the Court has no power to enter, and upon which it has no power to decide. In such a case as that, therefore, if a proper allegation of facts and circumstances raising such an equity be found in the bill, it must follow that this Court should exercise that universal jurisdiction

which it has in all cases of fraud and in all cases of resulting trust. The interposition of a special jurisdiction ceases the moment the case exists which the special jurisdiction has not authority to try. It has a delegated jurisdiction for certain purposes; but if a purpose arises beyond the scope of that delegated jurisdiction, there can be no more * invocation of that limited power to bar the right of another Court of universal jurisdiction interfering for the purposes of justice. * 496

That accordingly has been the current of decision, of which there is abundant evidence in the case of *Wearing v. Ellis*, (a) if indeed a case were required to illustrate principles so plain that they must, when stated, be admitted to be the guide of this Court by every one conversant with its jurisdiction.

I should have held, therefore, even if the Insolvent Debtors' Court had remained in all its integrity and power, that this case was taken out of the necessity of invoking the Insolvent Debtor's Court. The plaintiff would have been relieved from the obligation to go to that Court, the case being one with which it had no power to deal, and the order one which it could not have granted except upon terms which would have been destructive of the plaintiff's rights, it having been admittedly the habit of the Court, where there had been a vesting order, not afterwards to make a revesting order, but to annul the vesting order; but only upon the terms of the applicant confirming every thing which had been done by the assignee to the officer of the Court.

But the present case does not rest there.

By the operation of the Bankruptcy Act, 1861, the jurisdiction of the Insolvent Debtors' Court was abolished and entirely put an end to before the filing of this bill. In the Bankruptcy Act, 1861, the legislature thought it right to preserve and transfer to the commissioners of the Court of Bankruptcy, but merely for the purposes of * that Act, the jurisdiction exercised by * 497 the Commissioners of the Insolvent Debtors' Court. Besides that, they continued in the Commissioners of the Insolvent Debtors' Court, for a short period, a limited jurisdiction and authority, which enabled these commissioners to be active in bringing persons before them with a view of winding up what remained to be done. That jurisdiction was determinable by the

(a) 6 De G., M. & G. 596.

order of the Lord Chancellor; and it was accordingly finally brought to an end by an order made by the Lord Chancellor after all the business certified to him by the Commissioners of the Insolvent Debtors' Court had, upon their statement, been brought to an end. There may be, I do not determine that there is not, still a right to resort to the Commissioners of Bankruptcy for the purpose of exercising the necessary jurisdiction in respect of all matters emerging and arising anew out of antecedent insolvencies. For example, in an old insolvency, apparently wound up, some new discovery of assets or information might be obtained by which it would appear that the creditors might, in the name of the insolvent, recover some large property. There would be power to appoint an assignee in such an insolvency, and to give such directions as might be necessary for prosecution of such a right. But the Commissioners of Bankruptcy would have no power to make an order at the instance of the insolvent; and even had they such power, they would have it upon the same terms, subject to the same conditions, and bounded by the same restrictions and limits as those upon which the Commissioners of the Insolvent Debtors' Court had it when that Court remained in all its integrity. An application, therefore, to the Bankruptcy Court would subject the plaintiff to the same necessity of coming under terms destructive of his case which would have accompanied him had he applied to the Insolvent Debtors' Court before its destruction.

* 498 * It was said that he did make that application, and that the matter must be considered as *res judicata*; but what he did was merely to make an *ex parte* application to the commissioner—an application for the purpose of which the other side were not convened or cited—for a revesting order; treating the fact of his having been allowed to receive the money out of Court as evidence of the truth of his statement that all his debts had been paid. Upon that application the learned commissioner appears to have told him, in effect, “You cannot do that: you must have your original vesting order annulled; and you can only do that on an undertaking to confirm.” And accordingly the plaintiff desisted from an application so barren and injurious to his own interest. But the matter was no *res judicata*, for that could only be between parties duly convened on an issue properly raised and decided.

Such being the state of the case, it would be, in my judgment, a denial of justice and a refusal of the right of this Court to exercise jurisdiction in a case of resulting trust and in a case of fraud, if the plaintiff were denied the power of coming into this Court to complain of a case plainly falling within the original jurisdiction of this Court, and not taken out of it by any law or statute creating a special jurisdiction.

If a defendant demurs to the jurisdiction of this Court and says, in a case ordinarily falling within the powers of this tribunal, that this is not the proper tribunal, he must show that there is another tribunal to which the exclusive right and privilege of entertaining the application have been transferred. In the present instance the demurring defendants attempt to fulfil this obligation by pointing to the Insolvent Debtors' Court. But, for the reasons which I have given, the Insolvent Debtors' Court cannot *inter- * 499 fere in such a case. The case, therefore, remains the proper subject of this Court.

The case must not be confounded with those of *Rochfort v. Battersby* (a) or *Dyson v. Hornby*. (b) Those were two cases in which the House of Lords and this Court asserted this principle clearly; namely, that, pending the administration of an insolvent's estate in the Insolvent Debtors' Court, this Court will not interfere with the assignee in any matter relating to that administration. The difference lies between the refusal of this Court to interfere pending administration in another Court, and the right and duty of this Court to interfere when the administration in the other Court has ceased, and that other Court no longer retains power and authority to adjudicate on the question which has arisen. In the one case it is right not to interfere, because the other tribunal is seised of the matter; in the other case it is right and the duty of this Court to interfere, because the functions of the other tribunal have ceased and the limited authority which remains is not only not equal to the comprehension of the matter, but is one which can only be exercised on terms which would be destructive of the equity and right of the plaintiff.

For these reasons the demurrer must be overruled; and I should have overruled it—on the ordinary terms—with costs, had not the bill been so constructed as to render it very difficult indeed to

(a) 2 H. L. Cas. 388.

(b) 7 De G., M. & G. 1.

tell, with what is added to it, the definite case made. I therefore overrule the demurrer without costs: and the loss of his costs the plaintiff must know is attributable entirely to his own injudicious and improper interference.

1864. December 8, 9. Before the Lord Chancellor Lord WESTBURY.

Under the Merchant Shipping Act, 1854, so long as the mortgagee of a ship does not take possession, the mortgagor, as the registered¹ owner, subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not impair the mortgagee's security.

Where, therefore, a mortgagor in possession had made a charter-party which was not shown to be in any way prejudicial to the sufficiency of the security: *Held*, that the mortgagees were bound by it, and an injunction was granted, at the suit of the charterers, to restrain the mortgagees from dealing with the ship in any manner inconsistent with, or which might interfere with or prevent, the execution of the charter-party.¹

THIS was an appeal by the plaintiffs, Phineas Davis Collins and William Aubrey Chandlers, who were the charterers of a British ship called the *Maria*, from the refusal with costs by Vice-Chancellor KINDERSLEY of a motion for an injunction to restrain the defendants, William James Lamport, George Holt, and Philip Henry Holt, who were the registered mortgagees of the ship, but were out of possession, and James Webb, with whom, subsequently to the filing of the original bill and with notice on his part of the charter-party, they had entered into a contract for the sale of the ship, from dealing with her in any way inconsistent with, or which might interfere with or prevent, the execution of the charter-party, and from selling the ship without giving notice of the charter-party to the purchaser.

The injunction sought was ancillary to the specific performance of the charter-party, the enforcement of which was the main object of the suit.

¹ See 3 Kent, 134-136; *Rusden v. Pope*, L. R. 3 Exch. 269; *Brown v. Tanner*, L. R. 3 Ch. Ap. 597; *Howard v. Odell*, 1 Allen, 85; *Macy v. Wheeler*, 30 N. Y. 231; *Myers v. Willis*, 18 C. B. 886.

The Lord Chancellor upon the evidence held the charter-party to be binding upon the remaining two defendants to the suit, viz., Edwin Spencer Roberts and Thomas Luccock.

Of these the former was the registered owner and the * mortgagor of the ship, and the latter (who alone, as rep- * 501 resenting the ship, had signed the charter-party) was an intended purchaser from the mortgagor Edwin Spencer Roberts.

The mortgagees were no parties either to the charter-party or to the dealings between the mortgagor and his intended purchaser; and one of the questions discussed on the appeal, and on which alone it is considered necessary to report the case, was as to the right of the mortgagees and their intended purchaser, regard being had to the provisions of the Merchant Shipping Act, 1854, sections 70, 71, the terms of which are set out below, (a) to interfere with these matters.

Mr. Glasse and *Mr. T. H. Terrell* appeared for the appellants.

Mr. Baily and *Mr. Osler*, for the mortgagees, and

Mr. W. F. Robinson, for the defendant James Webb.

The arguments turned mainly on the construction of the sections of the statute which are above referred to; and in addition the Statute of 6 Geo. 4, c. 110, § 45, * and the cases of *The* * 502 *European and Australian Royal Mail Company, Limited v. The Royal Mail Steam Packet Company*, (b) *Marriott v. The Anchor Reversionary Company*, (c) *De Mattos v. Gibson*, (d) *Dean v. M'Ghie*, (e) and *Dickenson v. Kitchen*, (g) were referred to.

(a) Sect. 70. "A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt."

Sect. 71. "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some Court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee."

(b) 4 K. & J. 676.

(d) 1 J. & H. 79.

(g) 8 E. & B. 789.

(c) 3 De G., F. & J. 177.

(e) 4 Bing. 45.

THE LORD CHANCELLOR. — The mortgagor of this ship was desirous of selling her, and his intention was in course of fulfilment under an agreement with the defendant Thomas Luccock. He found it necessary for the purposes of the latter that the latter should be at liberty at once to charter the ship, and he acceded to that being done.

The question is whether, the mortgagor being under no contract or agreement with the mortgagees to deprive him of the right so to deal with his vessel other than that contained in the mortgage itself, the provisions of the Merchant Shipping Act, 1854, import into that mortgage a power for the mortgagees at their own good will and at any time to arrest every thing which has been done by the mortgagor, and to take possession of the ship, stripping her entirely of any contract or engagement to which she had been previously subjected by the mortgagor.

The inconvenience, to say nothing of the injustice, of such a construction of the statute, is palpable. No mortgagor could deal with his vessel in the ordinary way. Every operation would be incumbered by the necessity of resorting to the mortgagee
* 503 for his concurrence * or approbation, with a result of infinite difficulty and delay and expense and inconvenience in the transaction of ordinary mercantile business.

But, in truth, I cannot attribute to the legislature in passing this statute any intention to introduce a different course of dealing from that which hitherto had always been adopted. Under the earlier statutes the mortgagee, upon the making and registration of the mortgage, became, in the eye of the law, the owner of the property, the mortgagor being treated as his *quasi* agent. The result was, that the mortgagee frequently found himself bound either by the contracts of the mortgagor, or, at all events, by the necessary expenditure and outgoings of the vessel, a result seriously injurious and inconvenient to mortgagees, and one which interposed considerable difficulty in the way of persons desirous of raising money upon this species of security. To this state of things, and to the reasoning of the cases which had led to it, the legislature, by the statute which we are considering, opposes the declaration of the general principle, that the mortgagor shall be deemed to be the owner of the vessel. This it does by enacting, first, that the mortgagee shall not by reason of his mortgage be deemed to be the owner, and then, that the mortgagor shall not be

deemed to have ceased to be the owner, with an exception, however, thus expressed: except in so far as may be necessary for making such ship or share available as a security for the mortgage debt."

So long, therefore, as the dealings of the mortgagor with the ship are consistent with, and do not materially prejudice and detract from or impair the sufficiency of, the mortgagee's security, the mortgagor has parliamentary authority to act in all respects as owner of the * vessel, and therefore to enter into * 504 all contracts touching the disposition of her necessary to assure to him the full value and benefit of his property. But whenever a mortgagee can show that the act of the mortgagor prejudices or injures his security, he ceases to be bound by the parliamentary declaration as to the ownership of the mortgagor, and can claim the full benefit of and exercise the rights given to him by his mortgage. Every contract, therefore, entered into by the mortgagor remaining in possession is a contract which derives validity from the declaration of his continuing to be the owner; but, at the same time, every such contract is a contract into the benefit of which the mortgagee may at any time enter by giving notice to the person who under that contract is to pay to the mortgagor, that he requires the payment to be made to him, the mortgagee.

Such being as well a reasonable interpretation of the statute, — as making the law, with regard to this description of property, in a great measure analogous to the law as it exists with regard to mortgagees of real estate, — as also, according to my present impression, the true interpretation of the statute, I cannot — unless the further consideration which I will give to the case shall cause me to change my present opinion — allow the mortgagees here, in the absence of every thing to show that this charter-party, if permitted to be carried into execution, will at all prejudicially affect the sufficiency of their security, to interfere with its being carried into execution, but shall grant an injunction, restraining them and also the purchaser from them, from dealing with the ship in any way inconsistent with, or which may interfere with or prevent the execution of, the charter-party.

December 9.

* 505 * THE LORD CHANCELLOR. — I have again considered this case with regard to the relative positions of the mortgagor and mortgagees.

I see no reason to alter the opinion which I expressed at the conclusion of the arguments. In my judgment, under the statute, so long as the mortgagee of a ship does not take possession, the mortgagor, as the registered owner, subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not materially impair the mortgagee's security.

My order, therefore, will reverse that of the Vice-Chancellor, and be in the terms which I stated.

REDE v. OAKES.

1864. November 3, 4, 5. December 21. Before the LORDS JUSTICES.

Properties held partly by an absolute owner and partly by several sets of trustees under several trusts and for different persons were, by the vendors as a single body, agreed to be sold together in one lot for one undivided sum, — which the absolute owner, and the trustees and their several sets of *cestuis que trustent* afterwards apportioned by agreement amongst themselves, but not, as it appeared, on any sufficient data, — and with special conditions limiting the title, without, however, properly defining the portions of the properties affected by the limitations. The purchaser refused to complete the purchase, and the vendors filed a bill for specific performance of the contract: *Held*, reversing the decree of the Master of the Rolls, that the case was too doubtful to entitle them to the relief.¹

Observations as to the sale of trust properties conjointly with property not subject to the trusts, and the manner in which such sales ought to be made.

THIS was an appeal by the defendant from the decree made by the Master of the Rolls on the hearing of the cause and from an order made by his Honor on the cause coming on before him for further consideration.

¹ See 2 Chitty Contr. (11th Am. ed.) 1468. As to doubtful titles, see 2 Chitty Contr. 1496–1501; 1 Sugden V. & P. (8th Am. ed.) 386, note (d), and cases cited, 405 and cases in note (1).

* The circumstances of the case and the nature of the * 506 decree and order under appeal will be seen from the following statement of the facts, which is taken from the judgment of the Lord Justice TURNER, and supplements, and in some respects corrects, the statement of facts contained in Mr. Beavan's report of the case in the Court below. (a)

The suit was by the vendors of an estate against the purchaser for the specific performance of the purchase agreement. The agreement, which bore date the 8th of March, 1862, was for the purchase of the estate at the sum of 16,650*l*.

The vendors held the estate under different titles.

The great bulk of the estate was devised by the will of Robert Rede, who died in 1822, to the four daughters of Robert Rede Rede; and upon the marriages of these four daughters their respective shares of this part of the estate were vested or agreed to be vested in trustees in trust for them and their husbands for their lives, with remainder to their children, with powers to the trustees of the respective settlements to sell the respective shares.

A small part of the estate was vested in the trustees of the settlement made upon the marriage of Robert Rede Rede in trust for him and his wife for their lives, with remainder to their children, the four daughters, with power to these trustees to sell this part of the estate.

The rest of the estate, which was also but a small part of it, was vested in Mrs. Rede, the widow of Robert * Rede * 507 Rede, in fee under the will of Robert Rede Rede, who died in the year 1852.

These several sets of trustees and Mrs. Rede and the four daughters and their husbands concurred in the sale of the estate as one entire estate, and they were the plaintiffs in this suit.

After the estate had been agreed to be sold, and on the 8th of October, 1862, an agreement was come to between the plaintiffs by which it was agreed that 140*l*. should be considered as the value of such part of the estate as was the property of Mrs. Rede; that 852*l*. should be considered as the value of such part of the estate as was comprised in the marriage settlement of Robert Rede Rede and his wife, and should be received by the trustees of that settlement; and that 16,158*l*. should be considered as the value of the

residue of the estate, being the part which had belonged to the four daughters and was comprised in their marriage settlements, and should be received by the trustees of those settlements and be applied accordingly.

The estate had, it appeared, before the sale to the appellant, been put up for sale by public auction in lots under certain conditions of sale; and the lots sold to the appellant were so sold subject to such of those conditions as were applicable to a sale by private contract.

The sixth of the conditions was as follows:—

“The abstracts of title to the property, other than that part of which Mrs. Rede is vendor, shall commence as follows; viz.,—as to the manors and freehold portion with indentures bearing date respectively the 5th and 6th January, 1803, the 25th and 26th March, 1805, the 29th and 30th November, 1805, * 508 the 1st and 2d * March, 1807, the 1st and 2d October, 1813, and the 31st December, 1845, which respectively comprise certain parts thereof; and as to the copyhold portion with the admissions of the 30th December, 1825, the 27th December, 1833, and the 19th February, 1823; and as to the leasehold portion with indentures dated respectively the 31st March, 1788, and the 27th March, 1797; and as to such parts of the said manors and freehold portions as are not comprised in any of the aforesaid indentures (other than in the said indenture of the 31st December, 1845) the title shall commence with the will of Robert Rede, Esq., dated in 1821 and proved in 1822; and as to Mrs. Rede's part of the property, consisting of several cottages, the title shall commence with the will of her late husband, dated the 1st of February, 1831, and proved the 13th of December, 1852, with a declaration of a previous possessory title by him of upwards of fifteen years.”

The property comprised in the indenture of the 31st of December, 1845, was that part of the estate contracted to be sold, which was held upon the trusts of the marriage settlement of Robert Rede Rede and his wife.

The bill, as already stated, was for specific performance.

The appellant by his answer to the bill objected to the title to a part of the estate; and submitted that such of the parties to the

agreement of October, 1862, as were trustees were not competent as such and had no authority to enter into such an agreement for the apportionment of the purchase-money under the contract of March, 1862, and that he was not bound and declined to enter into any new contracts with the plaintiffs in regard to the purchase of the lots to which that contract had reference, or the division and apportionment of the aggregate * amount of * 509 the purchase-money for such lots. He further said that in the requisitions upon and objections to the plaintiffs' title, delivered on his behalf, it had been stated that the lots in question were sold for one sum under one contract, and consisted, — first, of a property to which the four daughters of Robert Rede Rede became entitled under the will of Robert Rede; secondly, of a property devised by Robert Rede Rede to his wife, the plaintiff Louisa Rede; and, thirdly, of a property conveyed to trustees by an indenture of the 31st December, 1845; that the sale of the first property was made by several trustees under the trusts and powers of four several settlements; and the sale of the thirdly mentioned property was also made by trustees; that under such circumstances the several properties ought to have been sold separately, and that the contract to sell all the properties at one price was not valid or such a contract as a purchaser could safely complete; and he submitted that these objections to the validity of the contract entered into with him were in no way remedied or displaced by the agreement of October, 1862; and he claimed the same benefit of those his objections, upon which he still insisted, to the contract as if he had demurred to the bill.

By the decree made by the Master of the Rolls at the hearing of the cause, the Court declared that the agreement ought to be specifically performed, and, after the usual reference as to title and when title was shown, the Court directed an inquiry in what portions and among whom the purchase-money ought to be apportioned and paid, and the further consideration was adjourned.

The chief clerk made his certificate in pursuance of this decree, by which he found the title to be good; and he found that the purchase-money ought to be apportioned * between the * 510 parties in the proportions which were mentioned in the agreement entered into between them.

The appellant moved to vary the certificate; but, by the order made upon this motion, and upon the hearing of the cause on

further consideration the Court refused the motion, and ordered specific performance of the agreement, directed the accounts which were necessary in order to the completion of the specific performance, and ordered the purchase-money to be paid to the parties in the proportions mentioned in the certificate which were those which had been agreed upon between the parties.

It was from this order and from that decree in the cause that the present appeal was brought.

Mr. Selwyn and *Mr. J. T. Humphry* appeared for the appellant, and

Mr. Baggallay and *Mr. F. J. Turner*, for the respondents, the plaintiffs in the suit.

Mortlock v. Buller, (a) *Thompson v. Blackstone*, (b) *Clark v. Seymour*, (c) *Pyrke v. Waddingham*, (d) *The South Wales Railway Company v. Wythes*, (e) *The Attorney-General v. The Earl of Clarendon*, (g) *St. Mary Magdalen College, Oxford v. The Attorney-General*, (h) *The Attorney-General v. Payne*, (i) and *Attorney-General v. Davey*, (k) were referred to.

* 511 * The scope of the arguments sufficiently appears from the judgment of the Lord Justice TURNER, and from Mr. Beavan's report of the arguments in the Court below. (l) At their close the Lords Justices reserved their judgment.

December 21.

THE LORD JUSTICE KNIGHT BRUCE. — The nature and facts of this case are such that I should not have regretted to find myself arriving at a conclusion different from that at which I have in fact arrived. My judgment, however, formed upon consideration, is that the bill should be dismissed, and my reason for that judgment is my inability to satisfy myself that the contract of March, 1862, sought by it to be specifically performed, was not a breach of trust, — not using that expression with any intention of imputing wrong

(a) 10 Ves. 292.

(b) 6 Beav. 470.

(c) 7 Sim. 67.

(d) 10 Hare, 1.

(e) 5 De G., M. & G. 880.

(g) 17 Ves. 491.

(h) 6 H. L. Cas. 189.

(i) 27 Beav. 168.

(k) 4 De G. & J. 136.

(l) 32 Beav. 556-558.

motive to any one, — on the part of the trustees who were parties to it, or that the plaintiffs' case was or is assisted by the agreement of October, 1862.

The contract of March, 1862, was a mistake. The vendors in it were, as vendors, a single body. The contract went to render the sale of so much of the property contracted to be sold as was comprised in the earliest settlement, and the price, whatever it was or might be, of that portion and the trustees of it liable to be affected by considerations and matters with which properly they had no concern; and to render the sale of so much of the property contracted to be sold as was comprised in the other settlements respectively, and the price, whatever it was or might be, of that portion and the trustees of it liable to be affected by considerations and matters with which properly they had no concern. *The * 512 trustees of the first settlement ought not, in my judgment, to have been made liable to be affected by any defect of title in any part of the lands sold belonging to the other vendors respectively; nor should the trustees of the later settlements have been made liable to be affected by any defect of title in any part of the lands sold by Mrs. Rede or her trustees.

The doctrine and principles applicable to cases of specific performance are, in my judgment, opposed to granting specific performance in this case; for, if it is not clear that the contract of March, 1862, was a breach of trust on the part of each set of trustees, it must be held, I think, to be at least reasonably and seriously doubtful whether it was not so. The bill should, in my judgment, be dismissed without costs, so as to leave the plaintiffs to pay their own costs incurred in the present suit, but no other costs of it.

The Lord Justice TURNER, after stating the facts to the effect of the statement of them herein before contained, proceeded thus:—

I am unable to agree with the Master of the Rolls in the conclusions at which he has arrived.

The case presents two distinct points for consideration: first, whether a specific performance of this agreement ought at all to have been decreed; and secondly, whether, assuming that specific performance was proper to be decreed, the decree and order under appeal were proper to be made.

The second of these questions does not arise if the first of them ought to be decided in the negative; and, in my judgment, it ought to be so decided.

* 513 * The argument on the part of the defendant upon this point was carried to a very great length. It was argued on his part that in no case could trustees for sale properly join in selling the trust property conjointly with other property not subject to the trust.

I am not disposed to assent to this proposition. I think it would be in the highest degree detrimental to trust property that any such general rule should be laid down. There are and must be many cases in which it is obviously beneficial to the persons interested under trusts that property not subject to the trust should be sold conjointly with the trust property, and I cannot agree that in such cases the two properties cannot be sold together; but I agree in this, that where such a sale is made due precautions ought to be taken that the trust property is in no way injured by the other property being united in the sale, and that the sale ought to be so made as that the portion of the proceeds to be attributed to the trust property can be settled upon some fair and reasonable basis, and is not left to rest upon speculation and conjecture.

The true question on which the validity of such a sale must depend seems to me to be this: Was or was not the sale made under such circumstances and in such a manner as that the *cestuis que trustent* ought to be held bound by it? If it was, the title of the purchaser could not, I conceive, be impeached. If it was not, his title would, I apprehend, be liable to impeachment at the suit of the *cestuis que trustent*.

It is in this point of view that the case before us ought in my judgment to be looked at.

Looking to the position of the different parts of this
* 514 * estate, I have no doubt that it was for the benefit of the persons interested under the trusts that the whole estate should be sold together; and if, therefore, the case rested here, I should have no difficulty in holding the purchaser to be bound by the contract.

The difficulty seems to me to lie not in the circumstances under which the sale was made, but in the manner in which it was made. There are two difficulties which here present themselves:

first, do the terms of the contract furnish the means of ascertaining upon any fair and reasonable basis the proportion of the proceeds of the sale which ought to be attributed to the trust properties; and, secondly, has the sale been so made as that the bulk of the trust properties may not have been injured by the other properties having been united with it in the sale.

The first of these questions is, I think, to say the least, open to very serious doubt. Looking to the sixth condition of sale, it would be necessary, in order to ascertain the proportions of the purchase-money proper to be ascribed to the different trust properties, to determine the values to be attributed to different parcels of the properties held upon titles of longer and shorter duration, a problem which it would be very difficult to solve. The trustees indeed seem to have arrived at a solution of it, and the Court seems to have adopted their solution; but I can see no *data* upon which either the trustees or the Court can have proceeded.

I assume for the purposes of this case that, upon a sale of this description, trustees would have or the Court would have the power of apportioning the purchase-money, although I am not satisfied even of this; but assuming it, I cannot but doubt whether trustees could *be warranted in making, or the *515 Court could be justified in directing or acting upon, an apportionment based on no sufficient *data*, and one which must in a great degree, if not wholly, be founded on conjecture. I doubt whether *cestuis que trustent* could be bound by such an apportionment.

I much doubt, therefore, whether upon this ground alone specific performance of this agreement ought not to have been refused.

I do not, however, decide the case upon this ground alone. There appears to me to be a still more substantial difficulty in the case, which is this; viz., whether this sale has not been so made as that the bulk of the trust property may have been injured by the properties having been sold together.

The particulars and conditions of sale nowhere specify the extent of the property held under the different titles; and as to part of the property, the extent of which is not specified, but which now appears to be of very limited extent, it is stipulated that seventeen years' title only shall be required. A purchaser of the property therefore might well suppose that he was to have a seventeen years' title only as to a large part of the property, and

might fix the price which he would give accordingly. I cannot but think that it is at least doubtful whether *cestuis que trustent* can be bound by a sale made by their trustees under such circumstances. I go no further than to say that it is doubtful ; for if there be a doubt it cannot, in my opinion, be thrown upon the purchaser to contest that doubt.

Looking to both the difficulties to which I have referred,
 * 516 but more especially to the latter, my judgment * is that this is not a case in which specific performance ought to have been decreed ; and I think, therefore, that the orders under appeal should be discharged, and the bill dismissed. Having regard, however, to the novelty of the questions raised by the appeal, and to the defendant's not having at once appealed from the original decree, I think it should be dismissed without costs.

A question afterwards arose as to whether the return of the deposit should or should not be mentioned in the order of the Court, and, if it should, whether its return should be ordered with or without interest. The decision of their Lordships upon this point has been already reported. (a)

Ex parte SIR JOHN WILLIAM LUBBOCK, Bart.

In the Matter of SAMUEL FLOOD and HARRY BUCKLAND
 LOTT, Bankrupts.

1863. May 22. Before the Lord Chancellor Lord WESTBURY.

The language of the orders of the Court of Bankruptcy must be construed with reference to the settled rules of the Court ; and it being the settled practice of the Court, that where a security consists of an equitable mortgage, and the mortgagee after a bankruptcy presents a petition for the realization of the security, he is not entitled to any interest subsequent to the date of the *fiat* : *Held*, that where securities by way of equitable mortgage comprised joint property of bankrupt partners, separate property of one partner, and property of a stranger, and the mortgagees being joint and separate creditors elected to prove against the separate estates, an order made on their petition and

(a) 2 De G., J. & S. 518.

directing an account of principal and interest due to them without express limitation of the calculation of the interest to interest due at the date of the *fiat*, did not entitle them to a calculation of, or to retain out of the proceeds of the securities, interest subsequent to the date of the *fiat*.

Dividends paid upon an erroneous principle ordered to be refunded after a considerable lapse of time and change of circumstances.

THIS was an appeal by Sir John William Lubbock, Bart., the surviving partner in a firm of bankers, against an order made on the 17th of April, 1863, by Mr. BIGGS ANDREWS, the Commissioner of the Court of Bankruptcy for the Exeter district, whereby the appellant * was ordered in effect to refund to the as- * 517 signees of the bankrupts a sum of money which had been paid out of the estates of the bankrupts in respect of interest accrued due subsequent to the date of the *fiat*, November, 1847, on certain equitable securities held by the appellant and his late partners.

The facts of the case were exceedingly complicated, but for the purposes of this report the following short statement of them is sufficient: —

On April 13th, 1849, the appellant's firm presented a petition in Bankruptcy, setting forth their securities, which were by deposit of title-deeds of estates, some of which constituted joint estate, others separate estate of one of the partners, and others property of a surety, and claiming to be creditors of the bankrupts "under and by virtue and upon the security of the before-mentioned deeds, securities, and documents so deposited with the petitioners, and of the hereditaments, &c., respectively comprised therein, for the sum of 7643*l.* 13*s.* for principal and interest at the rate of five per cent per annum, calculated to the 31st day of December, 1848, exclusive of subsequent interest thereon;" and praying (amongst other things) for a declaration that the petitioners were equitable mortgagees of the several estates, messuages, lands, tenements, hereditaments, &c., comprised in the several deeds and securities so deposited; for an account of what was due from the bankrupts to the petitioners for principal and interest upon and by virtue of the said several securities; for a sale, and for payment out of the moneys which should arise from such sale and out of the rents and profits of the said hereditaments of the costs of the sale in the first place, and for the application of the surplus of the sale moneys in payment to the petitioners of the said sum of 7643*l.* 13*s.* and

subsequent interest; but if the same should not be sufficient * 518 to satisfy and pay the said sum of 7643*l.* 13*s.* and subsequent interest, then for liberty to the petitioners to make such proof for the remainder of the said sum of 7643*l.* 13*s.* and subsequent interest under the *fiat* against the joint estate or the separate estates of the bankrupts as the petitioners might be advised or might be able to make.

An order was made upon this petition on the 6th of August, 1849, by the Chief Judge, Sir J. L. KNIGHT BRUCE, whereby (amongst other things) it was declared "that the petitioners were equitable mortgagees of certain messuages, &c., set forth in the schedule thereto annexed." And it was referred to the commissioner to take "an account of the principal and interest due to the petitioners in respect of their said securities;" and the hereditaments were directed to be sold, and the moneys applied, after payment of costs and expenses, "in payment to the petitioners of what should be found due to them as aforesaid," and the surplus, if any, to the official assignee; and after providing for the case of the moneys not being sufficient to pay to the petitioners "the amount of what should be so found due to them," and in that event giving the petitioners liberty to go in under the *fiat* and prove for the deficiency, and directing them to be admitted as creditors thereunder for what they should so prove, with a right to receive dividends ratably with the other creditors, the petition was ordered to stand over in all other respects, with liberty to the parties to apply, touching the matters in question, as they might be advised.

Under the reference to him contained in this order, the commissioner, in June, 1850, found that the sum of 7179*l.* 18*s.* 6*d.* was due to the appellant's firm by virtue of the securities set * 519 forth in the schedule annexed to the * order for principal and interest, "calculated to the date of the said *fiat*, together with a further sum of 834*l.* 1*s.* 6*d.* for interest thereon, calculated to the 31st of May, 1850, making together the sum of 8014*l.*, and not including interest accruing and to accrue due subsequent to such last mentioned date."

The appellant's firm had in the first instance entered a claim against the joint estate of the bankrupts, but afterwards (in August, 1851) by the leave of the Court they withdrew this claim, and in 1856 and 1857 proved against the separate estates of the bankrupts, and received dividends under such proofs. The por-

tions of the property not forming part of either of the estates against which the proofs were made were subsequently sold and the proceeds paid to the appellant's firm, who, by means of these payments and by the dividends paid on their proofs, had received altogether 5854*l.* 16*s.* 3*d.* If the accounts were to be taken on the principle of not allowing even as against the securities any interest beyond the date of the bankruptcy, this amount was in excess of that due by 416*l.* 11*s.* 6*d.*, and the commissioner ordered the appellant to refund that amount.

Mr. Daniel and *Mr. De Gex*, for the appellant. — There is no such universal rule as that interest cannot as against a security be allowed beyond the bankruptcy. *Ex parte Ramsbottom*. (a) Such a rule would contravene the well-settled principle that a security for a debt, part of which is provable and part not, may be applied by the holder of it to the latter part. *Ex parte Havard*, (b) *Ex parte Arkley*, (c) *Ex parte Johnson*. (d) * In * 520 this case the dispute is settled by the terms of the order which directs the computation of interest without restriction. If, when the Court made the order of 1849, it had intended to restrict the right of the then petitioners in respect of interest to interest due at the date of the *fiat*, it would have so expressed its order, as was done in the cases of *Ex parte Wardell* (e) and *Ex parte Hercy*. (e) The restriction cannot on any sound principle of construction be implied; and, regard being had as well to the frame of the petition on which the order was made as to the terms of the order itself, the question must be regarded as *res judicata*. At all events, as against our securities on the joint estate and on the estate of the surety, we may, notwithstanding our proof, apply those securities towards payment of all that is due to us (*Ex parte Shepherd*, *In re Plummer*, (g) *Ex parte Peacock*, (h)) including therefore interest up to

(a) 2 M. & A. 79, and see 2 M. & A., App. A.

(b) 1 Cooke, B. L. 124.

(c) 1 Cooke, B. L. 126.

(d) 3 De G., M. & G. 218. In a later case decided on the authority of that above reported, it was ingeniously argued, that the application of this principle ought to be confined to the state of the account at the date of the adjudication, and that the provable portion of the debt could not be afterwards increased. See *Re Savin*, L. R. 7 Ch. Ap. 760.

(e) 1 Cooke, B. L. 181; 2 M. & A., App. A.

(g) 2 M., D. & De G. 204; 1 Ph. 56.

(h) 2 Gl. & J. 27.

the date of payment; and as we cannot prove for interest subsequent to the date of the *fiat*, we have a right to apply our securities in discharge of that part of the amount due to us for which we cannot prove; viz., interest accrued due subsequently to the *fiat*, and to apply the dividends which we have received to that part of our debt which we can prove. Even if the dividends had been paid to us not according to the course of bankruptcy practice, which we deny, still, as we really lose part of the

interest to which in the Court of Chancery we should

* 521 without doubt be held entitled, the Court * will not at this distance of time, and after the death of one of the appel-

lant's firm and the adjustment of accounts with his estate on the footing of the order, direct the appellant to refund money paid to his firm under and according to the Court's own order. *Ex parte Soper*, (a) *Ex parte Wilson*. (b) In *Ex parte Sanderson*, (c) the Court refused in such circumstances even to rectify a miscalculation, though there was no question of refunding, no dividend having been declared.

Mr. Bacon and *Mr. Bevir*, for the respondents, the assignees, were not heard.

THE LORD CHANCELLOR. — The appellant's firm had at the date of the bankruptcy due to them from the two bankrupts, who were partners as bankers, a debt amounting to upwards of 7000*l.*, and in respect of that debt they held several securities as equitable mortgagees. The securities consisted, first, of property belonging to the bankrupts jointly; secondly, of property belonging to one of the bankrupts, *Mr. Flood*, severally; and thirdly, of deeds relating to property belonging to a *Mr. Miles*, who in this respect may be assumed to have acted as a surety.

Nothing can be better settled by the practice of the Court for the last sixty years than that where securities consist of an equitable mortgage, and the mortgagee, after a bankruptcy, presents a petition for the realization of that security, he is not entitled to any interest subsequent to the date of the *fiat*. Again: the language of orders made by the Court must be construed with reference to the settled rules of the Court. Apply these two

(a) 2 M. & A. 55.

(c) 8 De G., M. & G. 849.

(b) 1 M., D. & De G. 586.

* observations to the order made by the Court in this * 522 matter in August, 1849, and the construction of which is in reality all that we are now concerned with. [His Lordship here referred to the terms of the order in question, and proceeded thus:] I cannot assume that the Court in using the language which it did intended to depart from the ordinary rule, nor are any special circumstances brought before the notice of the Court which can be used for the purpose of setting aside that ordinary rule.

Under the direction, therefore, contained in the order, to compute principal and interest, interest is to be computed in conformity with the ordinary rule of the Court, which must apply where there is no direction to the contrary; namely, that interest is to stop at the date of the *fiat*. That being so, the form of the order settles the whole question as to the security, giving, as it does, the whole proceeds over to the assignee after payment of costs, principal and interest so computed. The finding of the commissioner in June, 1850, so far as it had reference to interest accrued due subsequent to the date of the *fiat*, was arrived at in error, and was not justified by the order. An argument was founded on the circumstance of the petitioner's firm having by leave of the Court withdrawn their claim against the joint estate, and elected to prove against the separate estates. But that argument only applies to 6000*l.* which was proved against the separate estate of Lott, leaving the petitioner entitled to the benefit of the order of August, 1849, as against the separate estate of Flood, to the extent of the dividends, which he has received from that estate under the order. The claim is, therefore, simply to retain interest subsequent to the date of the *fiat*, although the order of the Court is required for the purposes of proof.

The order under appeal is right, and the appeal must be dismissed, with costs.

* 523 * *Ex parte* MATTHEW BOULTON DAVIS.

In the Matter of JOHN HARRIS, a Bankrupt.

1863. May 30. July 18. Before the Lord Chancellor Lord WESTBURY.

A power given to an individual of nominating himself or any other person a partner in a business does not constitute him a partner.

An agreement was entered into between A. and B., whereby in effect A. was to carry on a certain business in the name of "A. & Co." for the benefit of himself and any person whom B. might at any time within eight years nominate: B. was to make certain advances to A. for the purpose of the business and become surety for him to a certain company: A. was to give B. promissory notes for his advances and any sums he might pay as surety, and to carry on the business in partnership with B.'s nominee for twenty-one years on certain specified terms: the profits of the business were to be for the first eight years applied in paying A. 100*l.* a year, and then in paying B. his advances with interest; and the residue was to be divided between A. and B.'s nominee in certain specified proportions, and losses were to be borne in the same proportions. The agreement gave B. a right to see the accounts relating to the business, and contained other special clauses under which B. might at any time within the eight years have nominated himself as a partner. Before the eight years had elapsed, and before any nomination had been made by B., A. became bankrupt, being indebted to B. for advances. There being no person who claimed to be a joint creditor of A. and B.: *Held*, that B.'s executor was entitled to prove against A.'s estate for the advances, the agreement not having constituted A. and B. partners as between themselves.¹

THIS was an appeal by Matthew Boulton Davis, the executor of Richard Francis Davis, deceased, from a decision of Mr. Commissioner HILL, rejecting a proof against the estate of the bankrupt John Harris, who was adjudged bankrupt in 1863, on the ground of the existence of a partnership between the appellant's testator, who is herein after for the sake of brevity called the testator, and the bankrupt.

There was no person who claimed to be a joint creditor of the testator and the bankrupt, and the question was, in substance, whether or not as between themselves the testator and the bankrupt were partners. This question depended upon the conclusion to be drawn from an agreement between the parties, which was

¹ See 1 Lindley Partn. (3d Eng. ed.) 29, 30; *Courtenay v. Wagstaff*, 16 C. B. N. S. 110.

expressed in the shape of recitals in the defeasance to a bond, dated the 7th of January, 1855.

* These were to the effect that the bankrupt had agreed * 524 to take a lease of certain premises belonging to the Blaen-avon Iron and Coal Company for twenty-one years, and to carry on there the business of a general shopkeeper, in the name of John Harris & Co.; that he had proposed to the company that they should accept his drafts upon them in the above names, with which he was to pay for goods, and that the company had agreed so to do on having a sufficient surety; that the bankrupt had proposed to the testator that the latter should advance to the bankrupt capital to assist him in providing goods and furniture, such advances not to exceed 1200*l.*; that the bankrupt, as a consideration to induce the testator to become such surety, had further proposed to him that the business should be carried on by the bankrupt and such other person or persons as the testator should, at any time within the space of eight years from the date of the bond, nominate or appoint; and that the bankrupt and the said nominee or nominees of the testator as aforesaid should be partners in the business on the terms therein after contained; that the bankrupt had further proposed as a further consideration, that the bankrupt should deliver to the testator, if required by him so to do, the promissory notes of the bankrupt, payable to the testator on demand, for the amounts of the drafts of the bankrupt on the company, and for the amounts of the advances made by the testator, such notes to be a security for the payment by the bankrupt of the said drafts, and for the repayment to the testator, his executors or administrators, by the bankrupt, his executors or administrators, of the advances of the testator; that the testator had consented to the proposals and had become surety as aforesaid, and that the company had agreed to grant a lease of the premises and to accept the drafts; that it had been stipulated and agreed between the bankrupt and the testator that the bankrupt, his executors and administrators, should * during the term carry on the business for * 525 the benefit of himself and the person or persons to be nominated by the testator as copartners with the bankrupt upon the terms after mentioned; that the bankrupt, his executors or administrators, would immediately upon the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners in the said business, admit and receive the

said nominee or nominees of the testator, his executors or administrators, to be a partner or partners in the said business; that the said partnership should commence and take effect immediately on the nomination in writing of such person or persons as aforesaid by the testator, his executors or administrators; that the said partnership should remain and continue for the term of twenty-one years from the date of the bond; that the clear profits should be applied in the following manner, — viz., 100*l.* per annum during the period of eight years from the date thereof should be paid to the bankrupt for the services of himself and his wife, the bankrupt should have board and lodging for himself and family, and the remainder of the said profits should be applied annually in or towards paying to the testator, his executors or administrators, the amount that should be from time to time due to him for his advances to the bankrupt or the said copartnership, with interest at 5*l.* per cent.; and after full payment to the testator the stock in trade and profits of the business were to belong to the said copartners in the following proportions, — viz., one-third to the bankrupt, his executors or administrators, and the remaining two-thirds to the nominee or nominees of the testator, his executors or administrators, and all losses, damages, and expenses to be incurred or occasioned in or about the carrying on of the said business were to be borne by the said copartners in the same proportions as

the profits of the said business were to be divided between
* 526 them; that the bankrupt, * until such nomination by the testator as aforesaid, should provide and keep books, such books to be always kept in the several counting-houses or other places where the business should be usually carried on, and where the testator, his executors or administrators, and each and every of the partners, should, at all convenient times in the day, have free access to them; that moneys and bills of exchange should be deposited or lodged with the cashier for the time being of the company, and were to be applied in taking up the drafts of the bankrupt and for the purposes of the business, in reimbursing the testator, and the paying the 100*l.* a year to the bankrupt; that after payment of the advances by the testator, with interest as aforesaid, the profits of the business should be divided at the end of every year between the said partners in the proportions aforesaid; that the bankrupt should not, either before the nomination by the testator, his executors or administrators, of a person or persons to be

a partner or partners in the said business, or during the continuance of the said copartnership, except with the permission in writing first obtained of the testator, his executors or administrators, or the said copartner or copartners, carry on any business on his own account or any other business; that the bankrupt should use his best endeavours to promote the success of the copartnership business thereby agreed to be established; that he should, until such nomination as aforesaid, and after such nomination of the said copartners, every year during the continuance of the said copartnership, make out accounts of all moneys received and paid by and on account of the said copartnership, and of all gains or losses which should have accrued or been sustained in the said business, and of all debts, and of all other the joint stock or effects then belonging thereto, so that the precise state of the business might be clearly ascertained; the estimate to be signed or subscribed by each and * every of the said partners; that previously to * 527 ascertaining the state and condition of the said joint trade in manner last mentioned, no division of the profits of the preceding year was to be made; that the bankrupt, until the nomination of such person or persons as aforesaid by the testator, his executors or administrators, and after such nomination of the said partners, was to give to the testator, his executors or administrators, his promissory note, or their joint promissory note, as the case might be, payable on demand, for the amount of each and every draft so to be made by the bankrupt, or by the bankrupt for himself and partner or partners, or by his said partner or partners, on the company; and also a like promissory note for every sum of money so to be advanced by the testator as therein before mentioned; that the bankrupt, his executors or administrators, was to stand possessed of the term as a trustee for the purposes of the said copartnership, and should not, without the consent in writing of the testator, his executors or administrators, or of the said partner or partners, give notice to the company to determine the lease; that if at any time during the said copartnership, and after the determination thereof, any dispute should arise of and concerning the true construction and meaning of the document now in statement, it should be referred to arbitration in manner therein mentioned; that the person or persons to be nominated by the testator, his executors or administrators, as partner or partners in the said business, might at any time thereafter sell and dispose of his or her

share or shares in the said business to any person or persons, who should thereupon become a partner or partners with the bankrupt in the said business; that if the bankrupt were to die in the lifetime of his then wife, his share in the business was to devolve upon and be enjoyed by her for the benefit of either herself alone, or

if she should have children, for the benefit of herself and

* 528 * children, but the management of the business was to be

vested in such person or persons as the said partner or partners entitled to the largest share in the said business should direct; that if (as in fact happened) the wife died in his lifetime, his share in the business should on his death cease, and the partnership thereby covenanted to be entered into by him should, so far as related to him, his executors or administrators, be at an end, but his executors or administrators should be entitled to be paid by the surviving or continuing partner or partners such a sum of money for the share of the bankrupt as should be fixed by arbitration; that, subject to the last proviso, the bankrupt should be at liberty to sell his share, provided that before such sale he should have given a notice in writing of his intention to each of the said partners, and in such notice should offer to sell his said share to the other or others of his said partners at a specified price; that if the bankrupt should die before the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners in the said business, the interest of the bankrupt, his executors or administrators, in the said business and the capital and stock in trade should cease; that if the bankrupt died in the lifetime of his wife, his one-third was to devolve on her, and the testator, his executors or administrators, was to be at liberty to nominate a person or persons to carry on the business with the wife for her benefit as to one-third of the business, and for the benefit of such nominee or nominees as to the other two-thirds, subject as aforesaid; that if the death of the bankrupt, previous to the nomination by the testator, his executors or administrators, of a person or persons to be a partner or partners as aforesaid, should happen after the death of his then present wife, the testator, his executors or administrators, might nominate a person or persons

to carry on the said business for the benefit of such nominee

* 529 * or nominees solely, but subject to the conditions and provisions therein before contained.

Mr. W. M. James and *Mr. Bagshawe*, for the appellant. — There was no present partnership between the parties, and no partnership at all was intended to be created until the testator exercised his power of nomination. Even if there were a present partnership between the parties the testator's estate was a creditor of the bankrupt for advances made by the testator to the bankrupt, and as such entitled to prove against his estate for the amount of the debt, where, as here, there is no person claiming to be a joint creditor of both the testator and the bankrupt.

They referred to *Waugh v. Carver* (a) and *Cox v. Hickman*. (b)

Mr. Lindley, for the respondents, the assignees of the bankrupt's estate, in support of the judgment in the Court below. — The commissioner's decision is right. On the true construction of the agreement between the parties they were present partners, a construction borne out if need were by their course of dealing. The bond and its defeasance were mere attempts to disguise the actual existence of a present partnership between the parties, and the present is a mere attempt to prove an item in an unsettled partnership account. Even if there were no present partnership between them, the moneys sought to * be proved for were * 530 by the agreement itself to be paid out of the business, and not by the bankrupt personally.

At the conclusion of his argument the Lord Chancellor directed the matter to stand over in order that his Lordship might satisfy himself, by an examination of the proceedings in the bankruptcy, on the question whether, independently of the bond and its defeasance, a present partnership had been created between the parties by their course of dealing.

July 18.

THE LORD CHANCELLOR. — *Mr. Richard Francis Davis* was the manager or managing director of an iron and coal company in Wales, called the Blaenavon Iron and Coal Company. It occurred to him that it would be a profitable speculation to establish general shops in three localities in Wales, for the purpose of supplying the goods that would be required by the miners and other persons

(a) 2 H. Bl. 235.

(b) 8 H. L. Cas. 268.

employed by the company, and he accordingly made an arrangement with the bankrupt John Harris, who had married his sister, that John Harris should carry on that business.

The terms of the arrangement are embodied in a certain bond dated the 7th of January, 1855, which is an ingenious piece of mechanism, and the provisions of which are very peculiar. The terms to which I refer are to the following effect: [His Lordship here referred to the terms of the defeasance to the bond in question, and proceeded thus:] The result of the arrangement was, that until the partnership should be created by Davis, there
 * 531 might be, if there were sufficient profits for * the purpose, a sum of money, the division of which would be suspended until the formation of that partnership.

The learned commissioner appears to have considered that the terms of the agreement amounted to a present partnership.

In my judgment that is not the effect of the agreement. No partnership can arise until the person to become partner has been nominated by Davis; and there is not, in my judgment, any present contract of partnership between Harris and Davis. The criterion that there is not, may be taken to be this, that had Harris become bankrupt before Davis had nominated a partner, any money reserved as profits to be hereafter distributed between the partners when the partnership was formed would, by the operation of that bankruptcy, be the property of Harris, the power of creating the partnership being put an end to by the event of such bankruptcy. All the provisions of the bond on which the learned commissioner has relied as indicating the creation of a present partnership, ought, in my judgment, to be construed with reference to the general intent of the bond, as provisions which shall become operative only subject to the condition and after the nomination of a partner by Davis, an event which never took place. The bankruptcy of Harris took place before there was any nomination of a partner, and there was therefore no contract of partnership, for there was no individual to answer the description and to fulfil the capacity of partner with Harris. I cannot hold that the power of nominating a partner given to an individual constitutes that individual himself a partner. It is true that the arrangements
 which are contained in the deed would probably absorb the
 * 532 whole of the profits before the possibility of * any division between the copartners. But that is the result of the con-

tract between Harris and Davis, which I think is well constituted by the bond, and is not at all affected by, or merged in, the power that Davis reserved to himself of hereafter creating, if he should think fit, a partnership between some nominee of his own and Harris.

I must, therefore, take the only subsisting contract between Harris and Davis, at the time of Harris's bankruptcy, to have been the contract of debtor and creditor in respect of the advances made by Davis to Harris, and the payments made by Davis on account of Harris ; and, consequently, I think the proof ought to have been admitted, subject to any adjustment of the figures which may be required.

It has been suggested that Harris was in reality only the agent of Davis, but I do not think there is any foundation in fact for that suggestion. Mr. Harris had a substantive and independent interest. In truth, he would be entitled to the whole of the profits after the payment of Mr. Davis, in the event of no partnership (as has been the fact) having ever been created by Davis nominating a person to become a partner.

I must, therefore, reverse the order under appeal, and declare that the executor is entitled to prove in respect of the debt due from Harris to his testator at the time of the bankruptcy.

* *Ex parte* JOHN COLLINGE, SAMUEL FOX, HENRY * 533
BAGSHAW, MATTHEW HENRY HABERSHON,
and DAVID DAVY.

In the Matter of HARRY HOLDSWORTH, a Bankrupt.

1863. November 4. Before the Lord Chancellor Lord WESTBURY.

The Court refused to relax the rule in Bankruptcy that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another until all the joint debts are paid, although, in the circumstances of the case and having regard to the amounts of the estates, the result of relaxing the rule would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would arise from the estate sought to be proved against if the rule were observed and the proof excluded.

The rule in question enures for the benefit of the separate creditors as well as of the joint creditors.

THIS was the appeal of John Collinge, Samuel Fox, Henry Bagshawe, Matthew Henry Habershon, and David Davy, trustees of a deed of assignment of the 14th of November, 1862, from the refusal by Mr. Commissioner WEST to admit a proof tendered by them against the estate of the bankrupt, Harry Holdsworth.

The question was brought before the Court on a special case, and, so far as it is necessary to refer to the facts, they were as follows:—

Major George Elliot Ashburner became a partner with the bankrupt in 1861. The partnership was dissolved in September, 1862, under an arrangement by which the bankrupt and William Holdsworth gave the major a bond to secure 10,000*l.* and interest, and the major transferred and released to the bankrupt all his estate and interest in the partnership. The bankrupt and William Holdsworth covenanted within nine months to discharge the joint debts of the firm.

On the 14th of October, Harry Holdsworth was adjudged bankrupt, there being at that time unsatisfied several large joint creditors of the dissolved firm.

In November, 1862, a meeting of creditors was held,—
* 534 * not, however, in pursuance of any statutory powers,—

whereat certain resolutions were passed, which resulted in the execution by Major Ashburner, on the 14th of November, 1862, of a deed of that date, which was expressed to be made between the bankrupt of the first part, Major Ashburner of the second part, the appellants of the third part, and the several other persons, being creditors in their own right or in copartnership of the bankrupt and Major Ashburner, or of one of them, whose names were thereto affixed or set, and all other the creditors of the bankrupt and Major Ashburner, or either of them, of the fourth part. By this deed Major Ashburner assigned to the appellants all his real and personal estate and effects upon the trusts therein after declared; and it was declared that the appellants should stand possessed of the effects of the bankrupt and of the property thereby assigned by Major Ashburner for the benefit of the creditors of the bankrupt and Major Ashburner in a like course of administration in all respects as if the existing bankruptcy had been annulled, and a joint adjudication in Bankruptcy had taken place against the bankrupt and Major Ashburner, and as if the estate and effects of the bankrupt and the property assured by the

deed had been vested in the appellants as the assignees under such joint adjudication.

The deed reserved to the appellants and to the parties of the fourth part all rights and privileges to which they would be entitled by virtue of the law and practice in Bankruptcy, and contained a release to, and an indemnity in favour of, Major Ashburner by the appellants and the parties of the fourth part in respect of their respective debts.

This deed was registered under the 194th section of the Bankruptcy Act, 1861.

* On the 17th of November, 1862, a meeting of the bankrupt's creditors was held, whereat the appellants were chosen assignees, and a resolution, which was afterwards confirmed by the Court, was passed with reference to the deed of the 14th November, 1862, that there should be reserved to the creditors of the bankrupt and Major Ashburner all rights and privileges to which they were respectively entitled under or by virtue of the law or practice in Bankruptcy. * 535

In working out the administration of the estates of the bankrupt and Major Ashburner under the above circumstances, and in the events which happened, there was but one creditor, viz., the Sheffield and Rotherham Banking Company, who claimed to prove against the separate estate of Major Ashburner, and the amount of their claim was about 1000*l.* The joint estate was insolvent; but the separate estate of the bankrupt showed a surplus of 5937*l.* 14*s.* 10*d.*, if the debt, the right on the part of the appellants to prove which formed the subject of the present appeal, was excluded.

The appellants, in their capacity of trustees of the deed of the 14th of November, 1862, claimed to prove against the bankrupt's separate estate upon the bond of September, 1862, and also upon certain checks and promissory notes given by him on the occasion of the dissolution of partnership for interest and share of profits. The amount of the proof so tendered was upwards of 11,000*l.*

Mr. Commissioner WEST decided against the appellants' right to prove, and it was this decision which was under appeal.

* *Mr. Bacon* and *Mr. Swanston*, for the appellants. — No * 536
doubt the rule, as laid down by Lord ELDON in *Ex parte*

Sillitoe, (a) that “ a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm who are in fact his own creditors, shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself,” is against the admission of this proof. But that rule, as Lord ELDON goes on to observe, is subject to one exception ; viz., in the case where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership. That exception Lord ELDON speaks of as manifestly founded in justice. On not dissimilar grounds we now press for the admission of this proof, even if its admission go to make another exception to the rule. The rule exists solely for the benefit of the joint creditors, and in order that the surplus which may be coming to them from any separate estate may not be intercepted or diminished by a proof on that separate estate on behalf of a partner or of his separate creditors. But the admission of the proof in the present case will not only not damnify the joint creditors, but it will positively benefit them. If the proof be admitted, it will, it is true, absorb the present surplus of the bankrupt’s separate estate, and so prevent it from falling into the joint estate ; but it will, on the other hand, bring into the separate estate of Major Ashburner a large amount which, after satisfying the claim of the Sheffield and Rotherham Bank, will leave to go over to the joint estate a larger surplus than would, if it had not been intercepted, have come over from the bankrupt’s estate. To apply the rule here * 537 would be to work injustice to the * joint creditors, and the case is one for an exception to the rule.

Mr. Giffard and *Mr. Hamilton Humphreys*, for the respondents, were not called upon.

THE LORD CHANCELLOR. — I cannot allow this proof to be entered.

The rule is, that a partner cannot prove for a debt so as to compete with the joint creditors, who are, in fact, his own creditors.¹

(a) 1 Gl. & J. 374, 382.

¹ The rights of the joint creditors preclude one partner from ranking as a separate creditor of his copartner, until the joint creditors have been paid in full. 2 Lindley Partn. (3d Eng. ed.) 1239, 1240.

Another rule is, that no joint creditor can make a claim against, or be paid out of, the separate estate until the whole of the separate creditors have been paid. It is a mistake to suppose, as has been argued, that the objection to a proof against the separate estate of a partner, on behalf of another partner or his estate, can be only sustained by joint creditors or for their benefit. The rule enures for the benefit of separate creditors also.

But it having been erroneously supposed that the objection lay in the mouths of the joint creditors only, it was thought that the objection might be met by the ingenious argument which has been here resorted to. The rule, however, remains, that so long as there are joint debts, a partner who is liable for those joint debts shall not make any claim against the separate estate, because, by possibility, he may come into competition with his own creditors. That principle is the foundation of the rule, and this ingenious argument does not touch upon its ground in the slightest degree.

The fact that after the bankruptcy an assignment was made of the separate estate of Major Ashburner * (including this debt due from the bankrupt), for the benefit of the joint creditors — probably so far converting his separate assets into joint assets — is of no avail, unless the joint creditors are willing to accept that assignment as payment in full and to release the joint liability. If that were done, and there were no longer any joint liability to which Major Ashburner was exposed as partner, there would remain no objection to his proof against the separate estate.

The resolutions of the creditors are out of the question, unless, as is not pretended, the meeting was held under some statutory powers, whereunder the resolutions would be binding upon all the creditors.

In my judgment, therefore, the learned commissioner came to a right conclusion, and this appeal must be dismissed. I dismiss it, however, without costs, and the deposit may be returned.

* 539

* *Ex parte* WILLIAM CANWELL.

In the matter of THOMAS VAUGHAN.

1864. March 16. April 20. Before the Lord Chancellor Lord WESTBURY.

The liability of a contributory under the Companies Act, 1862, § 75, commences at the date when he enters into the contract under which he becomes a member of the company which is being wound up.

THIS was the appeal of William Canwell, the official liquidator of the Waterloo Life, Education, Casualty, Self-Relief Assurance Company, from the refusal by Mr. Commissioner GOULBURN to adjudicate the respondent Thomas Vaughan a bankrupt on the appellant's petition. The company was registered in 1851 under the Stat. 7 & 8 Vict. c. 110, and its deed of settlement was dated in November, 1851.

His Honor was of opinion that there was no sufficient petitioning creditor's debt within the meaning of the Bankruptcy Act, 1861, § 90, the terms of which, so far as they are material, are set out below. (*a*)

The question turned upon the construction of the Companies Act, 1862, § 75, the terms of which, so far as they are material, are also set out below; (*b*) and it arose in this way:—

The respondent, who was a non-trader, was an original * 540 shareholder in the company, which was being wound * up as an unregistered company under the Companies Act, 1862, part viii., (*c*) and upon him, as a contributory, a call was

(*a*) The Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, § 90. "The debt of the petitioning creditor of any debtor not being a trader . . . must be a debt contracted after the passing of this Act." The Act received the royal assent on the 6th of August, 1861.

(*b*) The Companies Act, 1862, 25 & 26 Vict. c. 89, § 75. "The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as herein after mentioned for enforcing such liability: and it shall be lawful in the case of a bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made."

(*c*) See 31 Beav. 586.

made under an order in the winding up made in August, 1863. This call he neglected to pay, and left the country under circumstances which, it was contended, constituted an act of bankruptcy on his part, if the call constituted a good petitioning creditor's debt within the meaning of the Bankruptcy Act, 1861, § 90.

The commissioner held that the debt was contracted after the passing of the Bankruptcy Act, 1861, and the present appeal was from his decision.

The company was registered under the Companies Act, 1862, in January, 1863.

Mr. Giffard and *Mr. Roxburgh* appeared for the appellant.

Mr. W. M. James and *Mr. De Gex* appeared for the respondent.

The arguments turned principally upon the language of the sections of the Bankruptcy Act, 1861, and the Companies Act, 1862, already referred to, and their scope appears from the Lord Chancellor's judgment.

Reference was also made to the 80th, 83d, and 89th sections of the Bankruptcy Act, 1861, and to the 11th, *38th, *541 74th, 101st, 102d, 199th, 200th, 204th, sections of the Companies Act, 1862, and also to *Birch's Case*, (a) *Robinson's Executor's Case*, (b) *Ex parte Nicholas*, (c) *Ex parte Mendel*, *In re Moor's Assignment*, (d) and to the terms of the deed of settlement.

The words of the 204th section of the Companies Act, 1862, so referred to, and which were commented on in the Lord Chancellor's judgment, are set out below. (e)

THE LORD CHANCELLOR. — I cannot accede to *Mr. Giffard's* ingenious suggestion that the winding-up in this case, being under the eighth part of the Companies Act, 1862, is, by the

(a) 2 De G. & J. 10.

(c) 2 De G., M. & G. 271.

(b) 6 De G., M. & G. 572, 585.

(d) 1 De G., J. & S. 330.

(e) The Companies Act, 1862. Sect. 204. "... but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act."

operation of the concluding words of the 204th section of that Act, exempted from being subject to the 75th section.

The concluding words of the 204th section leaves the full operation of the whole of the eighth part as the rule for winding up, and it is declared, in the 199th section, that all the "provisions of this Act with respect to winding up shall apply to such company with the following exceptions and additions." Then follow a number of subordinate clauses, which are distinguished partly by numbers and partly by letters, and which constitute the exceptions and additions which are denominated "the following." The

words which *Mr. Giffard* desires to import into these exceptions are not found except at a remote portion * at the very end of this eighth part, namely, at the conclusion of the 204th section. I cannot give to the words the operation which he desires to attribute to them.

The winding-up order, therefore, which was made subsequently to the passing of this Act of 1862, must be governed by the operation of this Act and its express provisions.

Among those express provisions is the 75th section, by which it is declared as follows: [His Lordship read the terms of the section and proceeded thus:]

It is difficult to tell when the liability referred to in this section is to be considered as commencing; but my present impression is, that the legislature must be held to consider it as relating back to the date of the contract; that whereas under this section the commencement of the liability must clearly be held to be a period different from the time of the call being made, and it cannot be the date of the winding-up order, no other date can be assigned for the commencement of such liability than the date of the contract under which the contributory became a member.

In that view of the provisions of the Act of 1862, there would not be in this case a petitioning creditor's debt within the definition or requisition of the 90th section of the Bankruptcy Act, 1861; there would be no debt contracted by the respondent after the passing of that Act.

I will, however, reserve my final judgment upon the point.

April 20.

* THE LORD CHANCELLOR. — Upon further consideration, * 543
I adhere to the opinion which I expressed at the conclusion of the arguments. The commissioner's order, therefore, was right, and the appeal must be dismissed.

Ex parte ROBERT STEWART.

In the Matter of EDWARD SHELLEY, a Bankrupt.

1864. December 17. Before the Lord Chancellor Lord WESTBURY.

The object of the Joint-stock Companies Act, 1856, § 19, was that the company itself should not be bound by any trust, and that no notice should have any effect as against the company, but there is nothing in the Act which precludes an equitable mortgage of shares in a company, or renders an equitable mortgagee incapable of perfecting his title as against the mortgagor and his assignees in bankruptcy by giving notice of the mortgage to the company.

The managing director, who was also the sole secretary of a company registered under the above Act, joined with all his codirectors in making an equitable mortgage of their shares to a bank, as a security for an advance to the company. The bank gave no notice to the company. On the bankruptcy of the managing director: *Held*, that his shares were not in his order and disposition with the consent of the bank as the true owners thereof, but that the bank were entitled to them as mortgagees.

THIS was the appeal of Robert Stewart, one of the registered public officers of the Stourbridge and Kidderminster Banking Company, from the dismissal of a petition by Mr. Commissioner SANDERS.

The Victoria Silver, Lead, and Zinc Company, Limited, was a company incorporated and registered under the Joint-stock Companies Act, 1856, without articles of association, and, therefore, subject to the regulations contained in Table B. of the Act.

In May, 1862, the bankrupt Edward Shelley was the managing director and secretary of the mining company, and on its behalf applied to the bank for a loan of 2500*l.* * at interest. * 544
The bank acceded to the application, and made the advance upon the security of a joint and several promissory note, signed by the bankrupt and seven other persons, and of the deposit by the makers of the note of the certificates of 300 shares in the

company belonging to them. Of the seven makers of the note, other than the bankrupt, six were directors of the company, and they and the bankrupt together constituted the whole body of directors. Of the 300 shares, the certificates of which were deposited with the bank on the occasion of the advance, 105 belonged to the bankrupt.

In November, 1862, the bankrupt applied to the bank for a renewal of the note and a further advance of like amount. The bank acceded to the application, the additional security being given of the deposit of the certificates of 230 more shares, of which the bankrupt was the owner of 100, a renewed note signed by the same eight persons as before for the original advance, and a new promissory note signed by the same eight persons for the new advance. The notes were joint and several.

The bank gave no notice to the company of these deposits of shares.

The adjudication took place on the 15th of July, 1863.

Subsequently the appellant presented a petition to the Court praying an account of what was due to the bank, a sale of the shares, and liberty to them to prove for the deficiency.

The Court dismissed the petition on the ground that no sufficient notice of the deposit with the bank had been given to the company to take the shares out of the order and disposition of the bankrupt.

This was the order under appeal.

Mr. Bacon and *Mr. De Gex*, for the appellant, having opened the case on his behalf,

The Lord Chancellor called upon

Mr. Daniel and *Mr. Little*, who appeared for the respondents, the assignees, and who argued to the effect stated in the Lord Chancellor's judgment, citing the Joint-stock Companies Act, 1856, §§ 19, 23; (a) *Ex parte Boulton*, (b) *Ex parte Hennessy*, (c) *Thompson v. Speirs*. (d)

(a) These sections are as follows:—

Sect. 19. "No notice of any trust, expressed, or implied, or constructive, shall be entered on the register or receivable by the company; and every person

(b) 1 De G. & J. 163. (c) 2 Dr. & War. 555. (d) 13 Sim. 469.

A reply was not heard.

* THE LORD CHANCELLOR. — This case arises as between * 546 the appellant, a purchaser for valuable consideration, on the one hand, and the assignees in bankruptcy of the person who deposited the shares in question with the purchaser on the other.

It is a general rule that an assignee takes the property of a bankrupt subject to the equities which affect it in his hands; and therefore, as a general rule, he will take it subject to the effect of any contract for valuable consideration entered into before the bankruptcy. The deposit here was by way of equitable mortgage to secure a loan made to the bankrupt anterior to the bankruptcy, which was a contract for valuable consideration. The right of the appellant, therefore, will follow without the possibility of doubt, unless from some consideration founded upon the peculiar nature of the property.

First of all it has been said, on behalf of the assignees, that the right of the appellant as purchaser for valuable consideration is met by the provisions of the Bankrupt Law Consolidation Act, 1849, as to reputed ownership, and that to avoid their operation, a person taking a deposit of shares in a company, and having no more than an equitable title, must, for the confirmation of his title, give notice to the persons who may be called the trustees of

who has accepted any share in a company registered under this Act, and whose name is entered in the register of shareholders, and no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) shall, for the purposes of this Act, be deemed to be a shareholder."

Sect. 23. "The register of shareholders, commencing from the incorporation of the company, shall be kept at the registered office of the company herein after mentioned; except when closed as herein after mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any shareholder gratis, and to the inspection of any other person on payment of one shilling, or such less sum as the company may prescribe for each inspection; and every such shareholder or other person may require a copy of such register, or of any part thereof, on payment of sixpence for every one hundred words required to be copied; if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues."

the property, and to whom application might be made for the purpose of ascertaining of what the bankrupt was possessed.

The words of the statute are, "if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition,

any goods or chattels whereof he was reputed owner, or
 * 547 whereof he has taken upon * him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy."

According to the construction which has long been put upon this clause, the circumstance of the person having the equitable right not giving notice to the person in whose hands, at law, the property may be considered as resting, is a fact from which permission may be inferred on the part of the true owner, that the property shall remain in the hands of the bankrupt as the reputed owner.

It is apparent that neglect may not be evidence of consent. But it has been held that the neglect by an equitable purchaser or mortgagee to give notice of his security amounts to a sufficient proof of a consent that the bankrupt shall remain the apparent owner.

Then we come to the inquiry whether, in this case, there was that neglect.

First, however, let me dispose of the objection raised by *Mr. Daniel* and *Mr. Little* upon the Joint-stock Companies Act, 1856. Upon the 19th section of that Act they say that no notice of any trust, express, implied, or constructive, is allowed to be entered on the register or is receivable by the company; and they therefore argue that it is not in the power of an equitable mortgagee to give any notice because the Act of Parliament forbids the company receiving any such notice.

That argument goes to destroy the power of a shareholder to make any effectual equitable mortgage; but, in point of
 * 548 fact, the purpose of the enactment contained in * this 19th section was simply this: that the title of the shareholders in the books of the company should be kept wholly unincumbered and unaffected by any notice of equitable dealings. It would greatly embarrass the company if the shareholders were permit-

ted to incumber the register with notice of equitable dealings. The company would not know whether to summon to their meetings the persons on the list of shareholders or the persons claiming under these notices. The object, therefore, of the legislature was, that all persons appearing on the register should have a clear title not incumbered by the embarrassments which must arise if the legal title were permitted to be affected by notice ; or, in other words, that the company itself should not be bound by any trust, and that no notice should have any effect as against the company. I do not think it possible to carry the meaning of the enactment beyond that, nor does the 23d section carry the meaning beyond this : that the legislature will not permit the title of the shareholder to be incumbered with notice of any trust.

That being so, the case is reduced to an inquiry of fact ; namely, whether the notice involved in the transaction itself was or was not such a notice as rendered it impossible to say that the bank did permit the shareholder to continue the apparent owner, — impossible, in the face of the knowledge which resulted from the transaction itself, to impute to the bank any neglect to give notice. For the consent of the equitable mortgagee to the person with whom he deals continuing the apparent owner is inferred only from the neglect of the former to give notice. Is there, then, to be imputed to the bank any such neglect ? Could the bank have rendered the transaction more patent than the transaction rendered itself to the persons to whom notice should have been given ?

* It is material to observe that the case is free from the * 549 effect of any particular provisions contained in articles of association. There is nothing which prescribes that notice is to be given in any particular form or manner, at any particular place, or to any particular person.

Then what do we find upon the facts here ?

Here is a company actually constituted with seven directors, one of whom is also the manager, being at the same time the secretary, and who afterwards becomes bankrupt. It is considered desirable to have an advance of money for the purposes of the company. Accordingly the directors apply to the bank for a loan, and the seven directors individually arrange with one another to deposit the certificates of their several shares with the bank for the moneys

which are at the time advanced and lent by the bank. The secretary is a party to the transaction, and has a complete knowledge of it. Every one of the directors is a party to it, and has complete knowledge of it. It is impossible to say that this was a matter not authorized by the constitution of the partnership and not having direct reference to the affairs of the company. In a word, it was a company transaction. Could it be possible for the bank to have affected any mind in a more explicit manner than the transaction itself affected the minds of the directors?

Reference has been made to the judgment of the Lord Justice TURNER in *Ex parte Boulton*, (a) where one of two secretaries deposited certain shares as an individual, and no formal notice was given. It was held that his personal knowledge was not sufficient, because it would have been possible to give notice to the other secretary, and the Lord Justice appears to have thought that the other secretary was the proper person to receive the notice.

* 550 * That, however, is not by any means the case with which I have to deal. Here there is but one secretary, and this was a company transaction in which all the directors and the one secretary of the company joined. Without, therefore, giving any opinion upon the expressions attributed to the Lord Justice TURNER, I am clearly of opinion that the case of *Ex parte Boulton* (b) does not in any degree stand in the way of the decision which is most reasonable to be arrived at here; namely, that there has been no neglect in giving notice on the part of the bank, since they could not have given a more effectual notice than that which was actually derived by every party to whom they might have given it from the transaction itself. There cannot, therefore, be imputed to the bank any consent that the bankrupt should remain the reputed owner of the shares. It would have been perfectly unnecessary for the bank to have written a formal letter reporting every thing that had been done to the parties who were already fully acquainted with it.

In my judgment, therefore, the present appellant is entitled to the shares, and will add his costs to his debt. The assignees will have their costs out of the estate.

(a) 1 De G. & J. 177.

(b) 1 De G. & J. 163.

* *Ex parte* CHARLES TOPPING and Others. * 551

In the Matter of GEORGE LEVEY and CHARLES ROBSON,
Bankrupts.

1865. January 9. February 11. Before the Lord Chancellor Lord WEST-
BURY.

A firm of two became bankrupt, one partner being indebted to the other. The debt arose from a contract apart from the copartnership, and was in existence at the time of the adjudication. It was admitted that there could not be any surplus of the debtor partner's estate for the joint creditors, whether the debt was allowed to be proved against that estate by the creditor partner or not: *Held*, to be a proper case for relaxing the general rule, and that the creditor partner might prove against the debtor partner's estate; and it was so ordered, with a declaration that the proof must be subject to be expunged, and the dividend refunded, if any surplus of the debtor partner's estate should arise for the benefit of the joint creditors.

1865. July 26, 28. Before the Lord Chancellor Lord CRANWORTH.

A debtor executed a deed of inspectorship, which was intended to operate under the Bankruptcy Act, 1861, § 192, and which provided for payment of the debts by instalments, and the avoidance of the deed in certain contingencies, one of which happened, and for the revivor of the debts in that event, deducting dividends received under the deed. A certain creditor was mentioned as such in one of the schedules to the deed. The debt of this creditor was also mentioned in the statutory account of debts of the debtor, which was verified by his affidavit; and the creditor received a dividend on his debt from the inspectors under the inspectorship: *Held*, that the debt, being otherwise barred by the Statute of Limitations, was not by any of these circumstances taken out of the operation of the statute.

THIS was the appeal of Charles Topping and others from a decision of Mr. Registrar WINSLOW, sitting as a Commissioner in Bankruptcy, whereby he rejected a proof for 404*l.* 11*s.* 6*d.*, tendered by the appellant Charles Topping on behalf of the separate creditors of the bankrupt George Levey, against the separate estate of the bankrupt Charles Robson.

The proof was tendered in respect of a debt due to the bankrupt George Levey from the bankrupt Charles Robson, to whom, in the year 1834, the bankrupt George Levey had, out of his own private moneys, made an advance to enable the bankrupt Charles Robson

to increase his business capital. For the purpose of the argument before the Lord Chancellor Lord WESTBURY it was admitted * 552 * that the debt was unaffected by the Statute of Limitations.

The bankrupts were adjudged bankrupts as copartners in January, 1864, and the appellant Charles Topping was one of the assignees. The other appellants were separate creditors of the bankrupt George Levey.

It was admitted at the bar that the separate estate of the bankrupt Charles Robson would be insolvent, whether the proof in question was admitted or not, and that there could be nothing coming from that estate for the joint creditors.

Mr. De Gex, for the appellants. — The rule in bankruptcy with reference to the proof under a joint adjudication by one partner against his copartner's estate is laid down in the several text-books, as, for example, Messrs. Montagu and Ayrton's Bankrupt Law, (a) and Mr. Deacon's Bankruptcy, (b) but it is nowhere better stated than in Mr. Lindley's Book on Partnership. (c) Speaking of the joint creditors, Mr. Lindley says, "The rights of the joint creditors preclude one partner from ranking as a separate creditor of his copartner until the joint creditors are paid in full." Speaking of the separate creditors, he says, "They are obviously benefited by the rule which prevents one partner from proving against the separate estate of his copartner; but it is not for their sake that such rule has been established, (d) and where the reason for the rule ceases to exist, the rule itself ceases to be applicable. * 553 * Hence if there never were any joint debts, or if all those which once existed have ceased to exist, either because they have been paid, barred, satisfied, or converted into separate debts, then one partner who is a creditor of another may, on the bankruptcy of the latter, prove against his separate estate in competition with his other separate creditors." Mr. Lindley's reasoning is unanswerable; and this case, where, as is admitted, there is no possibility whether this proof against the separate estate of Robson be admitted or not of any surplus arising from that estate which would inure for the benefit of the joint creditors, falls within its scope.

(a) Page 274, 2d ed.

(b) Page 850, 3d ed.

(c) Pages 1008, 1011, 1st ed.; 1182, 1185, 2d ed.

(d) But see *Ex parte Collinge*, *supra*, p. 533.

Even did it not do so, the cases of *Ex parte Moore*, (a) *Ex parte Carter*, (b) *Ex parte Ellis*, (c) *Ex parte Rawson*, (d) *Ex parte Robinson*, (e) and *Ex parte May*, (g) if carefully examined, do not, as they have been supposed to do, require the actual non-existence of joint debts as a condition precedent to the right of one partner to prove against his copartner's estate; and to reject this proof in the present case — a case where by no possibility could Levey be said to be proving in competition with his own, the joint creditors — would be simply to favour the separate creditors of Robson at the expense of the separate creditors of Levey, to pay the former, in fact, with the money of the latter, and moreover by possibility to damnify those very joint creditors themselves for whose benefit a surplus might by the admission of this proof in favour of Levey's estate be produced from that estate. I submit, therefore, that upon all these considerations the general rule should in this case have been relaxed and the proof admitted.

* *Mr. Martineau*, for the assignees, who represented the * 554 joint estate. — I am willing to admit, for the purpose of the argument, that the debt, in respect of which it is sought to prove against the estate of Robson, is not barred by the Statute of Limitations. But I take no part in the argument, for it is clear upon the accounts in the bankruptcy that whether the proof be admitted or not Robson's separate estate is insolvent. The joint creditors are only interested, in fact, in any surplus which may come from Levey's estate; and in so far as the admission of the proof here may indirectly tend to further that result, I claim the benefit of *Mr. De Gex's* argument.

Mr. Robertson Griffiths, for a separate creditor of Robson, who had proved his debt against his estate. — The rule which it is sought to infringe is derived from sound principles of equity, and has existed time out of mind. It should not be infringed on the grounds of possible hardship in a particular case, even were its infraction not certain to open the floodgates of collusion. There must always be a possibility of a surplus of the separate estate against which the proof is sought to be admitted.

(a) 2 Gl. & J. 166.

(d) Jac. 274.

(b) 2 Gl. & J. 233.

(e) 4 D. & Ch. 499.

(c) 2 Gl. & J. 312.

(g) M. & Ch. 18; 3 Deac. 382.

Mr. De Gex, in reply. — The impossibility of a surplus of Robson's estate is here admitted.

He referred to *Ex parte Gill*. (a)

February 11.

* 555 * THE LORD CHANCELLOR. — The right which, under an adjudication of bankruptcy against two partners, one of them, who is a creditor of his copartner, has to prove against the separate estate of his debtor, where it is clear that whether such proof be admitted or not there will be no surplus of the separate estate of the debtor partner available for the purposes of the joint creditors, must be considered by the light of certain artificial rules which are derived from the principles of the Court of Chancery as to marshalling, and which were embodied for the first time in an order made in bankruptcy by Lord LOUGHBOROUGH in the year 1794. (b)

* 556 * By the effect of that order separate accounts are kept of the joint estate and of the separate estate of each partner, and if there be any amount of joint estate the joint creditors are not admitted to prove against the separate estate until the separate creditors are paid, and then they are to receive from the separate estate the surplus only which remains.

(a) 9 Jur. N. S. 1303.

(b) The order in question, which was issued on the 8th March, 1794, and will be found *in extenso* in Henley's Bankrupt Law, p. 191, App., ed. 3, and 1 Mont. & Ayr. B. L. 454, ed. 2, is, so far as it is material for the purposes of this report, as follows: "And I do further order, that the commissioners do cause distinct accounts to be kept of the joint estate, and also of such separate estate or estates: and that what shall be found to belong to the separate estate or estates shall be applied, in the first place, in or towards satisfaction of the debts of the respective separate creditors; and in case there shall be any overplus of the joint estate, after all the joint creditors shall be paid and satisfied their whole demands, that the share or shares, interest or interests, of the bankrupt or bankrupts, whose separate estate or estates is or are to be applied in manner before directed in such overplus, be carried to the account of his or their separate estate or estates, and be applied in or towards satisfaction of his or their separate debts; and in case there shall be any overplus of the separate estate or estates of such bankrupt or bankrupts, after all their separate creditors shall be paid and satisfied their whole demands, that the overplus of such separate estate or estates be carried to the account of the joint estate, and be applied in or towards satisfaction of the joint debts; and that the costs of taking such accounts be paid out of such separate estate or estates, and be settled by the commissioners, in case the parties differ about the same."

The consequence is, that it has been held that one partner cannot prove against his copartner, because, in ordinary cases, that proof would diminish the surplus of the estate of the debtor partner, and thereby the creditor partner, if admitted to prove, would come into competition with his own creditors, namely, the joint creditors, and detract to the extent of the proof from the benefit which they would derive from the separate estate. Therefore, it has been laid down as a general rule that a partner cannot be permitted to prove against the estate of his copartner until the joint debts are satisfied.

The question here is whether, under the circumstances of this case, that rule so expressed should be confined within the limits of the purpose by reason of which it was framed, or whether it should be carried out to the letter when the reason or purpose ceases to have any application.

There have been several cases before Lord ELDON, which are reported in the second volume of Messrs. Glyn and Jameson's Reports, but they have principally arisen under circumstances where the debt sought to be proved by one partner against his copartner has arisen in respect of transactions which have taken place subsequently to the bankruptcy; as, for example, where the partner has paid to the joint creditors more than properly

* he ought to have paid, and is entitled therefore to contri- * 557
bution from his copartner.

But the case before me is of a different kind, and I regard it as consisting entirely of these circumstances, to which I mean to limit my decision; namely, that the debt sought to be proved by the partner against his copartner is a debt arising from an undisputed contract apart from the copartnership, and which was in existence at the time of the adjudication in bankruptcy. I also limit my decision to a case where, as in this case, by no possibility can there be any surplus of the partner's estate against which proof is proposed to be made, whether the proof be admitted or not.

Limiting, then, my decision to a case so circumstanced, I think it reasonable and just that the rule should not be extended beyond the reason which introduced it and was the cause of its being laid down; and if it be true that the estate of the partner against which the proof is tendered cannot by possibility yield a surplus, it would be unreasonable and unjust to refuse the opportunity of proof being made.

It has been justly said by *Mr. De Gex* in argument that the result of the rejection of the proof would be to pay the creditors of one partner with the money of another, and also, as he has said, it would not be difficult to suggest a state of circumstances in which the joint creditors would be losers by the rule being observed. I will put one case. Suppose the separate estate of one partner to be 10,000*l.*, and his separate debts to be 10,000*l.*, exclusive of a debt to his copartner; if proof of his copartner's debt were not admitted the other separate creditors would be paid in full. But if he owed 10,000*l.* to his copartner, and proof * 558 were admitted, * then the creditors would receive only 10*s.*

in the pound. Now suppose the copartner to be indebted to his separate creditors to the extent of 1000*l.*, but to have no assets beyond the debt which is due to him from his partner. If you admit the copartner to prove against the estate of his partner for this debt you realize 5000*l.*, and the surplus of that sum over 1000*l.* will be for the benefit of the joint creditors, but if you refuse to admit the proof you lose the balance of the 5000*l.* In such circumstances the rule which was adopted nominally for the benefit of the joint creditors would, if it were adhered to, in reality deprive them of 4000*l.* Many other cases might be put in which injustice would arise if we were to pursue the rule to the letter when its spirit ceases to have any application.

In my judgment, therefore, the proof by one partner against the separate estate of another partner ought in this case to be admitted. But inasmuch as contingencies may arise which may render the separate estate of the partner larger than is now contemplated, there should be added to the order a declaration that the proof must be subject to be expunged and the dividend to be refunded in the case of any such surplus of the estate of that partner occurring for the benefit of the joint creditors.

In accordance with the above judgment, (a) the appellant again tendered the proof in the Bankruptcy Court, but it was * 559 again rejected by Mr. Registrar WINSLOW, * sitting as commissioner, and confirming the decision of Mr. Registrar MURRAY, before whom the proof had first been tendered, on the

(a) As to which see *Ex parte Bass, In re Motion*, 36 L. J. N. S. Bank. 39; *Lacey v. Hill*, before the Lords Justices, 20 December, 1872, to be reported in the Law Reports, 8 Ch. App. [441].

ground that the assumption on which the appeal had been argued ; viz., that the debt was not barred by the Statute of Limitations, (a) was incorrect. It was admitted that this was so, apart from the following circumstances, which it was contended took the case out of the operation of the statute.

In July, 1862, the debt having been incurred in 1834, a deed of inspectorship, which was intended to operate under the Bankruptcy Act, 1861, § 192, was executed by the bankrupts in favour of their creditors. This deed was expressed to be made between the bankrupts of the first part, certain gentlemen, of whom the appellant Charles Topping was one, as inspectors, of the second part, and the several persons, companies, and partnership firms, whose names and seals were set and affixed in some or one of the schedules thereto, being joint creditors of the bankrupts, and Francis Burdett Franklyn, a late partner of theirs, or separate creditors of the same three persons, and all other the joint creditors of the three, and all other the separate creditors of the three, of the third part.

It provided for the business of the firm being carried on for a period not exceeding three years under the inspectorship of the parties of the second part, and for the payment of the debts of the bankrupts in full by instalments at given intervals ; and it also provided for the avoidance of the deed if (amongst other things) at any time during the continuance of the inspectorship any execution or other process of law should be issued and enforced against the three copartners or any of them * which * 560 should or might, in the opinion of the inspectors, interfere with or prejudice the arrangement by the deed contemplated ; and in that event the inspectors were empowered, by writing under their hands, to declare the deed at an end, and thereupon the deed, and every clause, covenant, matter, and thing therein contained (so far as the same tended to restrain the creditors from suing for their debts) were to cease and determine, and the creditors were thenceforth to be at liberty to sue for or prove for the full amount of their respective debts or claims, except so far as they had previously received the same from other sources than under these presents ; and if any instalment should previously have been made under the deed the creditor who should have

(a) 9 Geo. 4, c. 14, § 1.

received the same was to account for the same (but without any liability to refund the same), and to be admitted as a creditor for the balance only of his debt or claim after deducting the amount so received.

The bankrupt George Levey executed this deed as well in his capacity of a party thereto of the first part as in his capacity of a separate creditor of the bankrupt Charles Robson, the amount of his debt being entered in the third schedule to the deed as 404*l.* 11*s.* 6*d.*

The bankrupt Charles Levey also executed the inspectorship deed, and it, with its schedules annexed, was registered, under the 192d section of the Bankruptcy Act, 1861, on the 12th of August, 1863, the bankrupt Charles Robson making, as required by the first article of the General Order in Bankruptcy of the 22d of May, 1862, (a) the usual affidavit verifying an account of his debts. This account contained the name of the bankrupt
 * 561 * George Levey as an assenting creditor in respect of the debt in question, and purported, as required by the order and its schedule, to be a full account of his debts amounting to 10*l.* and upwards, "to the best of his knowledge, information, and belief."

The inspectorship proceeded for some time under the provisions of this deed, and a dividend was paid thereunder by the inspectors, in November, 1863, to the creditors, amongst whom the bankrupt George Levey received a dividend in respect of the debt which he claimed against the estate of the bankrupt Charles Robson.

Ultimately, however, the deed was, by the Court of Queen's Bench, held to be not binding as against non-assenting creditors.

The result was, that execution was issued against the bankrupts; the inspectors, under the powers vested in them by the deed, put an end to it; and the bankrupts were so adjudged on their own petition.

July 26.

Mr. De Gex and *Mr. Fletcher*, for the appellants. — The facts of the case take it out of the Statute of Limitations. A promise to pay is implied from an acknowledgment unless negatived by its

(a) See this order in *De Gex & Horton Smith's Arrangements between Debtors and Creditors*, p. 23, note; and also *supra*, Vol. I. p. 235, note.

terms. Here there is nothing to negative it, but, on the contrary, there is a contract for payment in full if the deed should be avoided, an event which happened. There has been, moreover, part payment. If this was a payment on account generally, it is of course sufficient. If on the footing of the deed, then the instrument itself provides that if (as happened) it was avoided the payment should be taken as a part payment.

* They cited *Eicke v. Nokes*, (a) *Mountstephen v. Brooke*, (b) *Smith v. Poole*, (c) and *Tanner v. Smart*, (d) and distinguished *Everett v. Robertson*, (e) as a case in which the implication of a promise was excluded.

Mr. Martineau, who appeared for the assignees as representing the joint estate, took no part in the argument.

Mr. Robertson Griffiths, for the separate creditor of the bankrupt Charles Robson, supported the decision under appeal, relying on *Everett v. Robertson*, (e) *Davies v. Edwards*. (g)

Mr. De Gex, in reply.

July 28.

THE LORD CHANCELLOR (LORD CRANWORTH). — The question raised in this case was, whether a certain debt was taken out of the Statute of Limitations.

It has been contended that the debt was acknowledged because the debtor executed a deed of inspectorship, and because the debt in question was included in a schedule to that deed, as being a debt due from him to the creditor who was named. The question is, whether this was a sufficient acknowledgment to take the debt out of the statute. I was strongly of opinion that it was not.

But then there arose the further question whether the result would be affected by this, that there was an affidavit * made by the debtor in which he positively swore that * 563 this debt was due. But I think that that makes no difference, because the affidavit was only to the effect that the debt was

(a) 1 Moo. & R. 359.

(b) 3 B. & Ald. 141.

(c) 12 Sim. 17.

(d) 6 B. & C. 602.

(e) 1 Ell. & Ell. 16.

(g) 7 Exch. 22.

due *modo et formâ* as therein stated. The debtor swore that it was a debt payable out of the assets to be administered under that deed of inspectorship. The statute says that no acknowledgment or promise shall be sufficient unless it be a promise or acknowledgment contained in some writing to be signed by the party chargeable, and an acknowledgment that the whole debt is due is a sufficient acknowledgment within the meaning of the statute, if it be an admission that the whole is immediately recoverable. But the acknowledgment is not sufficient if the admission be that the debt can only be paid in part or in some qualified mode. That was decided in *Everett v. Robertson*, (a) by the Court of Queen's Bench, and if I felt any doubt as to the principle, which I do not, I certainly should not think of interfering, sitting as I do here in bankruptcy, with a decision of the Court of Queen's Bench.

In my judgment, the deed is only the creation of a trust to pay by instalments, and the affidavit contains an admission of the debt only *modo et formâ*, and hence there has not been an acknowledgment within the statute.

Then it is said that there has been part payment because the inspectors under that deed have paid a dividend. But there is just the same objection to that argument. Payment of a dividend under the Insolvent Act has been held by the Court of Exchequer, in *Davies v. Edwards*, (b) not to be a sufficient part payment to take the case out of the statute,¹ and the payment of a * 564 dividend * by an inspector is open to precisely the same objection. Part payment, in order to take the case out of the statute, must be not only payment on account of the debt, but payment accompanied with an admission, express or implied, that the balance of the debt is due and payable on demand. That was clearly not the case with this payment; the residue was not payable on demand; the promise was only that parts of the residue should be paid at certain intervals of time.

It seems to me, therefore, that this contention is open to exactly the same objection as that with respect to the acknowledgment, and this appeal must be dismissed.

(a) 1 Ell. & Ell. 16.

(b) 7 Exch. 22.

¹ See 2 Chitty Contr. (11th Am. ed.) 1259; *Roscoe v. Hale*, 7 Gray, 274, 276.

* GREEN v. GASCOYNE.

* 565

GREEN v. GASCOYNE.

GREEN v. GASCOYNE.

GREEN v. GASCOYNE.

1864. December 9, 10. 1865. January 12. Before the Lord Chancellor
Lord WESTBURY.

The concluding words of the Thellusson Act (40 Geo. 3, c. 98), sect. 1, must be construed to mean "if such excessive accumulation had not been directed."

The Act cannot be applied so as to accelerate the enjoyment of any gift or disposition contained in a will, nor for the purpose of giving to any term or description contained in a will a meaning which it would not have had had the trust for accumulation been good.¹ Although the trust for accumulation is cut down to a limited period, the whole of the rest of the will remains in point of disposition, and of the effect and interpretation of its language, precisely as if there had been no such operation performed by the Act.

Form of order as to costs where on appeal in an administration suit an heir-at-law, upon the construction of the testator's will, succeeded in establishing a right to rents of real estate accumulated under the directions of the will, but in excess of the period for accumulation allowed by the Thellusson Act.

THIS was an appeal by Thomas Gascoyne, the heir-at-law of Henry Gascoyne, the testator in these causes, from a decision of the Vice-Chancellor KINDERSLEY.

The suits were suits for the administration of the testator's estate, and the execution of the trusts of his will.

The will in question was dated the 22d of October, 1832, and by it, so far as it is material to refer to its provisions, the testator devised to his trustees in fee a freehold farm in Manea, in the Isle of Ely, upon trust during the lives of his wife and his sister Sarah Smith, and the lives of the longer liver of them to demise and let the same, and stand possessed of the rents, issues, and profits thereof, upon the trusts and for the intents and purposes therein after expressed; and after the decease of the survivor of his wife

¹ See 1 Jarman Wills (3d Eng. ed.), 291, 292; Perry Trusts, § 397; Lewin Trusts (5th Eng. ed.), 74, 75.

and his sister Sarah, upon trust to sell and dispose of the
* 566 farm; and as to the * money arising from the sale thereof,
and the rents, issues, and profits thereof until the same should
be so sold after the period at which the same should become salable,
the testator gave and bequeathed the same to his trustees upon the
several trusts therein after declared with respect to the money arising
from the sale of the residuum of his real and personal estate.

The testator devised two other specified estates in the Isle of Ely,
and all other his freehold and copyhold or customary messuages,
lands, tenements, and hereditaments not therein before disposed of,
to his trustees upon trust, until the 6th of April, 1843, to let and
demise the same, and to stand possessed of the rents and profits
upon the trusts after declared; and after the 6th of April, 1843, to
sell the lands and hereditaments lastly devised; and as to the
moneys arising from the sale thereof, and the rents, issues, and
profits thereof until the same should be so sold after the same
became salable, he bequeathed the same to the trustees upon the
several trusts after declared with respect to the money arising from
the sale of the residuum of his personal estate. And as to all his
personal estate not therein before disposed of, the testator gave and
bequeathed the same to his trustees, upon trust, as soon as conven-
iently might be after his decease, to sell and convert the same and
stand possessed thereof, and of the moneys arising from the sales
of his lands therein before directed to be sold, and also of the rents
of his said estates until the same should be sold, and all accumula-
tions thereof, and also the rents of the said estates after the same
should become salable, upon trust to pay and equally divide the
same unto, amongst, and between all and every the child and chil-
dren of his brother Jonathan Gascoyne, share and share alike, and
the issue of such of them as should be then dead, in manner therein
mentioned.

* 567 * The will contained a proviso that until the lands should
be sold the trustees should stand possessed of the net rents,
upon trust to pay certain annuities previously charged thereon,
and upon further trust to place out and invest the residue of the
said rents, issues, and profits which should not be applied for the
purposes aforesaid at interest upon specified securities, and receive
the dividends of the said trust moneys and invest the same, so that
the same and the resulting income might accumulate in the way of

compound interest; and when and as so soon as the said several estates should be sold or become salable, then upon trust to stand possessed of the said rents, issues, and profits and the accumulations thereof upon the several trusts, and to and for the several intents and purposes therein before declared concerning the same, and of and concerning the money arising from the sales of the said estates respectively.

The testator died on the 24th of September, 1838. Sarah Smith survived the widow, and was living on the 24th of September, 1854, when the period of twenty-one years from the testator's death expired.

The order under appeal was made by the Vice-Chancellor on the hearing of the causes, when his Honor held that the residuary legatees were entitled to so much of the accumulation made with reference to the Manea farm during the lives of the wife and sister and the life of the longest liver of them as were void by the Thellusson Act, 40 Geo. 3, c. 98, § 1, the material provisions of which are set out below. (a)

* *Mr. Glasse* and *Mr. Freeman* appeared for the appellant. * 568

Mr. Baily and *Mr. Shebbeare*, and *Mr. Osborne* and *Mr. Glaister*, for the persons interested in the residuary estate, and being respec-

(a) 40 Geo. 3, c. 98, § 1. . . . "No person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, deviser, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

tively the plaintiffs and defendants in the suits, supported the order of the Vice-Chancellor.

Smith v. Lomas, (a) Eyre v. Marsden, (b) M' Donald v. Bryce, (c) Viscount Barrington v. Liddell, (d) Trickey v. Trickey, (e) Gosling v. Gosling, (g) were referred to.

THE LORD CHANCELLOR. — I will state my present impression upon the will, and if upon weighing what I shall say it shall
* 569 appear to any * of the counsel engaged that I have taken an erroneous view of the construction of the will, the case may be spoken to again by one counsel on either side.

The case is that of a testator directing an accumulation during the lives of his wife and sister and the life of the survivor of them of the rents and profits of certain freehold estates.

The first question is, what is the operation of the statute upon that trust for accumulation. The second, what will be its effect upon the construction and interpretation of the will.

The first effect of the statute I apprehend to be that the trust for accumulation is reduced to a term of twenty-one years, and that I must take the trust as if it had been expressed "for a period of twenty-one years, provided my wife and my sister Sarah or the survivor of them shall so long live." Secondly, I take it that the words of the statute which direct that the rents released by its effect from the operation of the trust for accumulation shall "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed," must be construed to mean "if such excessive accumulation had not been directed." The meaning of the words, therefore, is brought to be the same as it would have been had the accumulations been directed for twenty-one years only.

I am not at liberty to apply or use the statute so as in any manner to accelerate the enjoyment of any gift or disposition contained in the will, nor can I use the statute for the purpose of giving to any term or description contained in the will a meaning which it would not have had had the trust for accumulation been good
* 570 instead * of bad. Although the trust for accumulation is

(a) 4 N. R. 318.

(b) 2 Keen, 564; 4 M. & C. 231.

(c) 2 Keen, 276, 517.

(d) 2 De G., M. & G. 480.

(e) 3 M. & K. 560.

(g) Johns. 265.

cut down and reduced to a limited period, the whole of the rest of the will remains in point of disposition, in point of the meaning, effect, and true interpretation of its language, precisely as if there had been no such operation performed by the statute.

What, then, is the real effect of the dispositions of the will before me, at what time are they directed to arise and come into enjoyment, and what upon the will, taken without the statute, is the meaning and true interpretation of the words descriptive of the subject-matter of the several gifts?

The testator devises the estate in question to three trustees in fee. He directs them first to let the devised estate during the lives of his wife and sister and the life of the survivor, and then he makes the first declaration, namely, that they shall stand possessed of the rents, issues, and profits of these devised lands (which must be the rents, issues, and profits during the lives over which they are directed to continue to let the same, namely, the lives of the widow and sister and the life of the survivor) upon the trusts therein after expressed. Then there immediately follows a direction to sell the estate so devised, a direction coming into operation upon the death of the survivor of the wife and of the sister. That is a period marked beyond the possibility of dispute, and it must be carefully borne in mind throughout the whole of the construction of the will. It must also be borne in mind, that in directing the estate to be sold the testator adverts in very clear language to the rents of the estate which shall arise after it becomes salable, that is, after the death of the survivor of the widow and sister and before the period of the actual sale.

* Having, then, directed the estate to be sold at the period * 571 which I have mentioned, the testator declares that the proceeds of the sale and the last description of rents, namely, rents accrued after the estate becomes salable but before actual sale, shall be held by the trustees upon the trusts therein after declared of the residue of his real and personal estate.

We have, therefore, first, a trust declared by reference of the rents in the aggregate during the lives of the widow and sister, and then a trust declared of the proceeds of the sale and of the rents after the estate has become salable.

The first words which are referred to, and which to a certain extent answer to both those references, are the words declaring the trusts of the residue. There we find a direction with reference

to "the rents of my said estates until the same shall be sold and all accumulations thereof, and also the rents of the said estates after the same shall become salable," words comprising both classes of rents, as well those which are the subject of the first of the subsequent accumulations as those which are to arise after the estates have become salable.

The contention on the part of the respondents is, that the words "the rents of my said estates until the same shall be sold and all accumulations thereof" admit of a different meaning after the application of the statute from that meaning which they clearly would have had had there been no statute to apply. Had there been no statute in existence for cutting short the accumulations, it is clear that the words "the rents of my said estates until the same shall be sold," and "all accumulations thereof," would have been identical. Not that the word "accumulations" is mere
 * 572 surplusage, because it must be * remembered that a trust to accumulate affects the interest of the principal sums invested, and then again the interest on that interest. With the words "rents thereof until the same shall have been sold and accumulations thereof," the word "accumulations" would comprehend not only the rents first spoken of, but also the produce, in the shape of interest and compound interest, on those rents. But the words "the rents of my said estates" could not by possibility have been applied, had there been no statute, to any thing save the rents directed to be accumulated. And how is it possible to give to those words by the operation of the statute the interpretation which I am asked to give; namely, that they shall be taken to denote and include the rents which are emancipated from the trust to accumulate by the operation of the statute? It is clear that the testator used the words to denote only the rents that he had directed to accumulate, and it is impossible to give them a different meaning by reason of the law having to a certain extent forbidden and therefore annulled that accumulation.

The result is that there is a *hiatus* between the period when the accumulation ceases by law and the period when the accumulation is directed to cease by the will; there is nothing in the will to catch the rents which arise during that *hiatus*; and those rents accordingly belong to the heir-at-law.¹

¹ See *Oddie v. Brown*, 4 De G. & J. 179, and cases in note (1); *Edwards v. Tuck*, 3 De G., M. & G. 40, cases in note (2); 1 *Jarman Wills* (3d Eng. ed.), 292; *Lewin Trusts* (5th Eng. ed.), 74.

1865. January 12.

On this day, no reargument of the case being desired, an order was made in accordance with the above judgment, with a declaration, made after some discussion, that the costs of all parties before the Vice-Chancellor relating to and occasioned by the dispute or question between the heir-at-law and the parties beneficially interested * under the will of the testator, together * 573 with the costs of the present application, ought to be borne by the properly accumulated rents of the estate in question and the rents to which the heir-at-law was, by the order now made, declared entitled proportionably according to the relative values thereof. (a)

In the Matter of BUNBURY'S SETTLED ESTATES.

1864. December 29. 1865. January 14. Before the Lord Chancellor, Lord WESTBURY.

Where, after petition has been presented under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120) and advertised, amendments in it become necessary, it is not of course upon the amended petition to begin *de novo* with respect to the advertisements. The course to be adopted will depend upon the discretion of the Court, which will be governed by the particular circumstances of each case.

If the amendment involves the statement of such new facts or the introduction of such new parties as to give to the petition a new character, new advertisements would be directed. *Semble.*

Circumstances under which advertisements of an amended petition under the Act were held not to be necessary.

THIS was a petition under the Leases and Sales of Settled Estates Act, (b) seeking the sale of some settled freehold and customary property.

The petition had been duly advertised, when certain amendments in it became necessary. The Master of the Rolls allowed the amendments to be made, and the only question was whether the petition as amended ought to be the subject of fresh advertisements: and this question was, by the leave of his Honor, submitted to the Lord Chancellor.

(a) Reg. Lib. 1865, A. 1051.

(b) 19 & 20 Vict. c. 120.

The subject-matter of the amendments was twofold.

* 574 * In the first place, by an error as to the tenure of the customary property, the person who was made a party to the petition as the customary heir was not so in fact. The person, however, who was so in fact was also a party to the petition in another capacity. Both were among the number of several co-petitioners.

In the next place, the wife of one of the petitioners had, under an appointment made by him under a power contained in the will whereby the property was settled, become entitled to a life-interest in part of the property in reversion expectant upon her husband's death.

Mr. Kekewich, for the petitioners, referred to the language of the 20th section of the Act (a) and the Consolidated Order XLI., rules 15 to 17, both inclusive.

1865. January 14.

THE LORD CHANCELLOR. — The Act of Parliament gives a discretion to the Court with reference to directing the issue of such advertisements as it shall think fit. And I think that this discretion continues with regard to an amended petition, and that it is competent to the Court to take into consideration the issue of advertisements of an amended as well as of an original petition.

Every case must depend upon its peculiar circumstances ; and if the amendment involves the statement of such new facts or the introduction of such new parties as to give to the petition a

* 575 new character, the Court will * hardly act discreetly in not directing new advertisements.

In the particular case before me the amendment involved two alterations.

It originally stated the eldest son to be the heir-at-law and the customary heir of the testatrix. It has been since found, on inquiry, that the youngest son was the customary heir. But both the eldest and the youngest sons were parties to the original petition. The alteration, therefore, does not involve the necessity of new advertisements.

The second alteration consists in this, that a power of appoint-

(a) " Notice of any *application* to the Court under this Act shall be inserted in such newspapers as the Court shall direct." . . .

ment in favour of his wife has been exercised by one of the sons since the presentation of the petition. But that circumstance, in my judgment, is not such as to render the case introduced by the amendment substantially different from the case of the original petition; nor can I suggest to myself any possibility of danger such as to warrant the necessity of fresh advertisements.

I think, therefore, in this particular case, that it is not necessary to have fresh advertisements.

It is by no means of course upon an amended petition to begin *de novo* with respect to advertisements. The course to be adopted will depend upon the discretion of the Court, which will be governed by the particular circumstances of each case.

* ROLFE v. GREGORY.

* 576

1864. December 6. 1865. January 18. Before the Lord Chancellor Lord WESTBURY.

A fraudulent abstraction of trust property by the trustee and a fraudulent receipt and appropriation of it by another person for his own personal benefit place the receiver in the same situation as the trustee from whom he received it, and he becomes subject in a Court of Equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself; and when it is said that the person who receives under such circumstances is converted by the Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust.¹

But the relief against the receiver in such cases is founded on fraud and not on constructive trust, and therefore the right of the party defrauded is not affected by lapse of time, or, generally speaking, by any thing done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud that has been committed.²

¹ See *Jenckes v. Cook*, 9 R. I. 520; *Perry Trusts*, §§ 166 *et seq.*

² See 2 Story Eq. Jur. § 1521; *Allfrey v. Allfrey*, 1 Mac. & G. 99; *Phalen v. Clark*, 19 Conn. 421; *Stocks v. Van Leonard*, 8 Geo. 511; *Gibson v. Fifer*, 21 Texas, 260; *Smith v. Fly*, 24 Texas, 345; *Martin v. Martin*, 35 Ala. 560; *Sherwood v. Sutton*, 5 Mason, 143; *Dod v. Essex Ins. Co.*, 12 Gray, 65; *Doggett v. Emerson*, 3 Story, 700; 1 Dan. Ch. Pr. (4th Am. ed.) 645, and cases in notes (3) and (6); *Blair v. Bromley*, 5 Hare, 559; 1 Sugden V. & P. (8th Am. ed.) 254, note (7¹); 2 Chitty Contr. (11th ed.) 1235, note (1).

such they contend is the true result of the evidence) had elapsed since the transaction complained of.

This, or some such view of the case, appears to have been adopted by the Vice-Chancellor, and accounts for the form of his decree. But it involves a misapprehension of the true principles on which the action of this Court is founded.

The relief is founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust.¹

As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by any thing done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.

* 580 * In the present case the transaction between the defendants Rolfe and Gregory did not become known to the plaintiffs until some time in the year 1858; there is no pretence, therefore, for treating the case of the plaintiffs as a stale demand.

On the ground, then, of the fraud committed by the trustee Rolfe, to which Gregory was a party, and by virtue of which he received and now holds the trust property, I decree that he restore that property to the parties beneficially entitled by payment of the sum due on the promissory note, viz., 600*l.*; but inasmuch as the plaintiff Mrs. Rolfe, who is entitled to the interest on the note, has been maintained by her husband, who was the debtor of Gregory, and as her counsel did not press for interest from an earlier period, I shall only direct payment of interest from the time of the institution of the suit.

The decree of the Vice-Chancellor must be reversed.

¹ This explanation of the law by Lord WESTBURY tends to relieve the cases from many of the difficulties attending an attempt to construe as a trust those acts which constitute only a fraud. See *Perry Trusts*, § 166, *et seq.*

* *Ex parte* The DARLINGTON DISTRICT JOINT- * 581
STOCK BANKING COMPANY.

In the Matter of RICHES AND MARSHALL'S TRUST-DEED.

1864. November 9. 1865. January 18. Before the Lord Chancellor Lord
WESTBURY.

Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes.¹ All persons may give credit to his acts and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it. In that case authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud.

The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.²

Where the bankers of an individual member of a firm, knowing that the firm banked elsewhere, received from and discounted for their customer bills of

¹ See 1 Lindley Partn. (3d Eng. ed.) 280.

² See *Williams v. Brimhall*, 13 Gray, 462; *Collyer Partn.* (5th Am. ed.) § 496, and note (3); *Fall River Union Bank v. Sturtevant*, 12 Cush. 372; *Franklin v. M'Gusty*, 1 Knapp P. C. 305; *Gansevoort v. Williams*, 14 Wend. 133; *Livingston v. Roosevelt*, 4 John. 251, 277, 278; *Livingston v. Hastie*, 2 Caines, 246; *Maudlin v. Branch Bank*, 2 Ala. 502; *Williams v. Gilchrist*, 11 N. H. 535; *Davenport v. Runlett*, 3 N. H. 386; *Rogers v. Batchelor*, 12 Peters, 229, 230; *Venable v. Levick*, 2 Head, 351; *Miller v. Hines*, 15 Geo. 197; *Powell v. Messer*, 18 Texas, 401; *Robinson v. Aldridge*, 34 Miss. 352; *Taylor v. Hillyer*, 3 Blackf. 433; *King v. Faber*, 22 Penn. St. 21; *Clay v. Cottrell*, 18 Penn. St. 408; *Story Partn.* § 133; 1 Lindley Partn. (3d Eng. ed.) 345, 346. But it has been held that this rule regarding the burden of proof does not apply where the security of one firm is given to pay the debt of another firm by one who is a common member of both firms. *Tutt v. Addams*, 24 Missou. 186; *Murphy v. Camden*, 18 Missou. 122; see *Rollins v. Stevens*, 31 Maine, 454; *McQuewans v. Hamlin*, 35 Penn. St. 517.

exchange, purporting to be drawn and indorsed by the firm and also indorsed by the customer, the signatures of the firm as drawers and indorsers and of the customer as indorser, as well as the whole of the bills, with the exception of the signatures of the acceptors, being in the customer's handwriting: *Held*, that the transaction showed on its face a conversion by the customer of partnership property to his own purposes; that the bankers had been guilty of great negligence in abstaining from inquiry; and that they could only claim as against the customer's copartners so far as the customer himself might have claimed compensation from them in respect of moneys paid by him out of his private account for partnership purposes.

THIS was an appeal by the Darlington District Joint-stock Banking Company from the rejection by Mr. Commissioner ABRAHAM of a proof tendered on behalf of the appellants for 1460*l.* 4*s.* 9*d.*, against the estate of two debtors named Riches and Marshall respectively.

The estate in question was being wound up under the * 582 provisions of a trust-deed executed by the debtors for * the benefit of their creditors, and registered under the 192d section of the Bankruptcy Act, 1861, and the proof the rejection of which was under appeal was tendered in respect of certain bills of exchange expressed to have been drawn and also indorsed in the name of the late firm of Riches, Kay, & Marshall, of which the debtors were the surviving partners.

The business of the firm, which as a partnership began in 1862, had been that of ship-brokers, and also of coal-fitters; but in this latter respect the business appeared to have been confined to transactions with a certain gentleman named Spark, who was the trustee under the trust-deed.

Kay had been the eldest and most experienced of the partners. He had exercised great influence over his copartners, and to him the management of the whole of the business had been given. The financial concerns of the partnership had been also entirely under his control.

The firm had had a banking account with the Union Bank at Sunderland. Kay had kept a separate account with the appellants' Stockton branch. The appellants had been well aware that the Union Bank kept the partnership account.

Kay died in January, 1864, and after his death a fraud of a very singular description was found to have been committed by him.

The partnership, in the capacity of ship-brokers, had been in the

habit of advancing small sums of money to the masters of vessels and to the captains of vessels which they were employed to charter and fit out; and * in connection with these advances * 583 Kay had adopted this contrivance: —

He had taken stamped slips of paper on which bills of exchange were usually drawn, and doubling down either end of the slips, so as to present only the middle parts, he had written upon these in pencil the figures of small sums of money which as ship-brokers they had paid to the masters or captains; and he had received or taken from each master or captain his signature at the foot of the pencil figures, intending thereby to denote that the individual signing had received the sum of money in question. He had then rubbed out or expunged the pencil figures, and thereby had acquired and had slips of paper fit for writing a bill upon, stamped and with the genuine signatures across their faces. Over these signatures he had written the ordinary words of acceptance: and he had converted the bills into bills of exchange, to which he appended the name of the partnership firm, “Riches, Kay, & Marshall.”

He had carried on this species of forgery or fraudulent manufacture of bills of exchange to a very large amount, and those bills so created had been carried by him to his own private bankers, the appellants at Stockton, and were there at his instance discounted by the appellants.

At the back of the bills Kay had written the name of the partnership firm as indorsers, and beneath that he had written his own individual name. Each bill therefore purported on the face of it to have been drawn by the partnership, and to have been accepted by an individual whose acceptance had been obtained in the manner described, and each bill also appeared to have been indorsed by the partnership to the individual partner Kay. In that state, as has been stated, they * were carried by him to his * 584 bankers, the appellants, and negotiated. It was on bills thus created that the proof, the rejection of which was the subject of the present appeal, was tendered.

Mr. Bacon and *Mr. De Gex*, for the appellants, contended that this was altogether different from cases in which a partner accepts, in the name of his firm, a bill drawn on the firm by a separate creditor of the partner. Such a transaction is *prima facie* invalid,

the acceptor not being indebted to the drawer, and the latter having therefore direct notice of the want of authority of the partner, and of the untruth of the words "for value received." In the present case the bill purported to be drawn by the firm on its debtor, then to be indorsed by the firm to the partner, and by him to the bank, all of which proceedings were, on the face of them, regular and proper.

They referred to *Ridley v. Taylor* (a) and *Ex parte Bushell*, (b) and distinguished *Ex parte Agace*, (c) *Shirreff v. Wilks*, (d) *Ex parte Peele*, (e) *Ex parte Bonbonus*, (g) *Ex parte Goulding*, (h) *Frankland v. McGusty*. (i)

At the conclusion of their arguments and without calling on

Mr. Greene and *Mr. Roxburgh*, for the respondent, the trustee under the trust-deed,

* 585 * The Lord Chancellor said that his impression was that the decision of the learned commissioner was correct, but that his Lordship would read through the papers in the case, and for that purpose reserved his judgment.

1865. January 18.

The Lord Chancellor (after stating the facts to the effect of the above statement of them) proceeded as follows: —

The firm of the partnership (the drawers), the indorsement to Kay, and the name of Kay are all in the handwriting of Kay. The bills therefore appear on the face of them to be securities belonging to and to be the property of the partnership, and any person looking at the indorsement would immediately presume that Kay had indorsed over the partnership security to himself; and if that individual were the private creditor of Kay to whom the bill was tendered he would also know that Kay was using this partnership security, which he had thus appropriated for his own private purposes.

(a) 13 East, 175.

(b) 3 M., D. & De G. 615.

(c) 2 Cox, 312.

(d) 1 East, 48.

(e) 6 Ves. 602.

(g) 8 Ves. 540.

(h) 2 Gl. & J. 118.

(i) 1 Knapp P. C. 274.

The law on the subject is clear and well established.

Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it. In that case authority * by virtue of the partnership con- * 586 tract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act, he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud. These principles have been established by a long series of decisions, — if indeed decisions were required in respect of a matter so plain and obvious, — as, for example, *Ex parte Peele*, (a) *Ex parte Bonbonus*, (b) and *Ex parte Goulding*, (c) and the other cases which were referred to in the course of the argument. I may also adopt a passage which I find in a book of considerable merit, the late Mr. Smith's *Compendium of Mercantile Law*, (d) — a passage which was cited with great approbation by the Judges of the Court of Common Pleas in the recent case of *Leverson v. Lane*, (e) — and which is as follows: —

“ It would seem that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.”

It is immaterial whether the partnership security is applied in

(a) 6 Ves. 602.

(c) 2 Gl. & J. 118.

(b) 8 Ves. 540.

(d) Page 44, 2d ed.; p. 46, 6th ed.; p. 45, 7th ed.

(e) 13 C. B., N. S. 278, 282, 285.

discharge of an existing debt or whether it is used by the individual partner for the purpose of obtaining money from his own bankers to be applied for his own personal purposes.

* 587 * Some attempt was made on the part of the appellants to show that the moneys advanced by them to Kay were used by him for partnership purposes; but, assuming the attempt to be made with success, the result would merely be that the form of proof would be a proof by the appellants in respect of that debt, if any, which was due from the partnership to Kay in respect of the money so applied; a result which would avail the appellants but little. In point of fact, however, there is no doubt that Kay greatly defrauded his copartners.

Some attempt, again, was made to show that the partners ought to have been cognizant of a transaction of this description. But there is nothing to justify any such inference or conclusion. It is quite clear that this gross forgery and fraud of Kay was a scheme resorted to by him simply for his own purposes, and one which he carried on with a view to his own private advantage through the agency of the appellants, his separate bankers.

The appellants themselves were undoubtedly guilty of great negligence. They must have seen on the face of the bills that they had been called into being by the individual partner who wrote the partnership name originally at the foot of the bills; that the same hand wrote also the indorsements, and that the same hand added the individual name of Kay.

On the face of the transaction, therefore, it was plain that the partnership security was converted by the individual partner into his own private personal property, in order that it might be applied to his own private purposes, and yet the appellants received such bills and discounted them at the instance of that individual partner with whom they had an account, knowing full well

* 588 that * the firm itself had a proper bank of its own with which the ordinary partnership account was kept.

The appellants' case cannot be put higher than the right of the individual partner with whom they dealt, and they can have no claim to be compensated by the partnership unless that be the right of that individual partner.

The learned commissioner decided rightly, in my judgment, in rejecting this proof: and the appeal must be dismissed, with costs.

Ex parte GEORGE NICHOLLS and JOHN THOMAS.

In the Matter of the Charities of VALENTINE POOLE and SIR STEPHEN WHITE, in the Parishes of Hackney, West Hackney, and South Hackney, in the County of Middlesex.

1865. January 13, 14, 31. Before the LORDS JUSTICES.

The Charitable Trusts Act, 1860, § 8, gives no right of appeal to the Court of Chancery without the authorization of the Attorney-General or of the charity commissioners to two private inhabitants of a parish from an order made by the commissioners in respect of parish charities, the actual yearly income of which is below 50*l.*; and it makes no difference that the order sought to be appealed against embraces more than one such charity, and the aggregate yearly income of the whole exceeds 50*l.*

THIS was an appeal by the Attorney-General from an order made by the Master of the Rolls in the matter of the charities of Valentine Poole and Sir Stephen White, in the parishes of Hackney, West Hackney, and South Hackney, in the county of Middlesex.

The order under appeal was made upon a petition * pre- * 589 sented, without, however, any authorization from the Attorney-General or the Board of Charity Commissioners by the respondents, two of the inhabitants of the parish of Hackney, by way of appeal from the following order, which had been made on the 10th of November, 1863, by the commissioners:—

“ Charity Commission.

“ In the Matter of the Charities of Valentine Poole and Sir Stephen White, in the parishes of Hackney, West Hackney, and South Hackney, in the county of Middlesex.

“ The Board of Charity Commissioners for England and Wales having considered an application in writing made to them on the 23d day of January, 1862, in the matter of the above-mentioned charities by the rectors and church-wardens of the several parishes of Hackney, West Hackney, and South Hackney, for the purposes of the following order; and it appearing to the said board that the endowments of the said charities consist of the several hereditaments and sums of stocks mentioned in the schedule hereto; and

that the gross annual income of the said charities amounts to 30*l.* 12*s.* and 29*l.* 12*s.* respectively or thereabouts; and upon public notice of the intention of the said board to make the order herein after contained having been given by the affixing of the same according to the directions of the said board to the principal outer doors of the said parish churches of Hackney, West Hackney, and South Hackney aforesaid more than one calendar month previously to the date hereof; and no sufficient notice of any objection thereto or suggestion for the variation thereto having been received by the said board, do hereby order that the rectors and church-wardens of the said several parishes of Hackney, West Hackney, and South Hackney, and their respective successors in office, by virtue

* 590 and during * their tenure of office, be and they are hereby appointed to be the trustees for the administration and management of the said charities, and that the legal estate of and in the several pieces of land and hereditaments comprised in the schedule hereto, and all other real estate (if any) belonging to or held in trust for the said charities or either of them, be and the same is hereby vested in the official trustee of charity lands and his successors in trust for the said charities respectively."

A schedule was annexed to this order showing of what the endowments of the two charities consisted.

The order under appeal discharged this order of the commissioners and directed the rest of the petition to stand over, with liberty to the respondents to lay proposals before the Judge in Chambers for a scheme for the future management of the charities.

- The question was whether it was competent, in the present case, to two inhabitants to appeal to the Court of Chancery from the order made by the commissioners.

This depended upon the construction to be put upon the 8th section of the Charitable Trusts Act, 1860: the material portions of which are set out below, (a) * and the arguments,

(a) The Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136):—

Sect. 8. The Attorney-General or any person authorized by him or by the said board, in the case of any charity, whatever may be the yearly income of its endowments, and any trustee or person acting in the administration of or interested in any charity of which the gross yearly income to be calculated in manner aforesaid shall exceed fifty pounds, or any two inhabitants of any parish or dis-

so far as it is necessary to refer to them, turned entirely upon that point. The other facts of the case, so far as they are material, will be seen from the judgments of the Lords Justices.

The Attorney-General (Sir R. PALMER), *Mr. Hobhouse*, and *Mr. T. H. Terrell*, for the appellant, referred to Stat. 16 & 17 Vict. c. 137, §§ 21, 44, and 18 & 19 Vict. c. 124, § 29, and to *St. Mary Magdalen College, Oxford v. The Attorney-General*. (a)

Mr. Selwyn and *Mr. Prendergast*, for the respondents, referred to *Reg. v. The Archdeacon of Exeter*. (b)

The Attorney-General, in reply.

Judgment reserved.

January 31.

THE LORD JUSTICE KNIGHT BRUCE. — Subject only to one question, I think that the order made by the commissioners in November, 1863, was reasonable and convenient, and one consistent with the merits and justice of the case, and that it ought to be supported.

The one question to which I have referred is the question whether the charity commissioners had by law jurisdiction to make that order of November, 1863.

If they had, there was not nor is in my judgment any * thing of consequence capable of being said against their * 592 order.

If they had not, I still do not conceive that this Court ought, in or under any proceeding now before it, to disturb that order, or to leave it discharged. The two petitioners against it were and are merely two private inhabitants of the parish of Hackney, respectable gentlemen I have no doubt, but still, I repeat, only two

trict in which the same shall be specially applicable, may, within three calendar months next after the definitive publication of any order of the said board appointing or removing a trustee or trustees, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate, or establishing a scheme for the administration of the charity, present a petition to the High Court of Chancery, in a summary way, appealing against such order, and praying such relief as the case may require. . . .

(a) 6 H. L. Cas. 189.

(b) 11 W. R. 262.

private inhabitants. Their petition had not in any sense or form the concurrence or sanction of the Attorney-General, and was altogether opposed by him, he desiring then and still desiring that the commissioners' order should stand. The trustees appointed by the commissioners are still, I collect, not unwilling to act, and to act so far as they can under the commissioners' order in the character of trustees; and in such a state of things as this, I think the course most consistent with the well-being and good administration of the charities is to decline interposing against the commissioners' order, and to leave it standing.

Accordingly, with deference to the Master of the Rolls, I consider that whether the order made by the commissioners was perfectly or not perfectly regular, the order discharging it should be discharged, and the petition presented to the Master of the Rolls dismissed; my judgment being that if the commissioners' order was made without jurisdiction, which I do not assert, the Court was not and is not under any judicial necessity of discharging or varying it under the petition presented against it.

The Lord Justice TURNER (after stating the facts of the case to the effect of the above statement of them) proceeded as follows:—

Upon the best consideration that I have been able to
 * 593 * give to this case, I think it was not competent for these two inhabitants to appeal to the Master of the Rolls from the order made by the Board of Charity Commissioners.

The jurisdiction of charity commissioners is wholly statutory, and the right to appeal from orders made by them must be measured and is limited by the statutes on which that jurisdiction is founded. In this case it depends upon the construction to be put upon the 8th section of the 23 & 34 Vict. c. 136.

The Master of the Rolls has construed this section as consisting of and being divisible into three distinct parts, giving three different and independent rights of appeal; first, to the Attorney-General, or any person authorized by him or by the Board of Charity Commissioners, whatever may be the yearly income of the charity; secondly, to any trustee or person interested in any charity of which the gross yearly income exceeds 50l.; and thirdly, to any two inhabitants of any parish or district in which the charity or its

income may be specially applicable whatever the amount of the income may be.

But, with all deference and respect to his Honor's opinion, I cannot agree in this construction of the section.

It seems to me that, according to the true construction of the section, it consists of and is divisible into two parts only; by the first a general right of appeal being given to the Attorney-General, or to any person authorized by him or by the board, whatever may be the yearly income of the charity, whether it does or does not exceed 50l.; and by the second a right of appeal being given to trustees * or persons interested, or to two inhabi- * 594
tants of the parish or district where the gross yearly income of the charity exceeds 50l.

This construction appears to me to be more consistent with the collocation and terms and spirit of the section and with the scheme, and also the course of legislation upon this subject, than the construction which his Honor has adopted.

Looking at the collocation of the section, I cannot imagine that the intention could have been to give an unlimited right of appeal to two inhabitants. In that view of the case the section would give first an unlimited right to the Attorney-General, then a limited right to the trustees and persons interested, and then again an unlimited right to two inhabitants. Had it been intended to give to two inhabitants an unlimited right of appeal, they ought to have been classed with the Attorney-General or a person authorized by him or by the board.

Then, as to the language of the section, a right of appeal is given to any two inhabitants of the parish or district in which, to use the terms of the Act, "the same shall be specially applicable." These words, "the same," may refer to a charity or to the income of a charity; but they refer to one or to the other; and the ordinary rule of construction, I apprehend, is that relative words are to be referred to the last antecedent; and those words therefore ought, in my judgment, to be taken to refer to the charity or the income last before-mentioned; viz., the charity or income exceeding 50l. per annum, and not to go back to the charity or income first mentioned in the section, and which is unlimited as to amount. The two inhabitants, therefore, to whom the right of appeal is * given must, if this view be correct, be themselves inhabi- * 595

tants of the parish or district in which the charity having a gross annual income of 50*l.* is applicable.

Then, as to the spirit of the section and the scheme of the Act, the section clearly points to a distinction between charities the income of which is above, and charities the income of which is below, 50*l.* This distinction is clearly, as I apprehend, made for the purpose of preventing the funds of small charities from being exhausted by litigation, as too frequently happened before the appointment of the charity commissioners; and it is not unreasonable to suppose that the legislature may have intended with this view to limit the right of appeal on the part of the inhabitants to cases in which the annual value of charity exceeds 50*l.*, especially having regard to this consideration, that small charities would still have the protection of the Attorney-General and the board of commissioners under the first part of the section.

Passing from the provisions of this particular section to the course of legislation upon this subject, it is obvious from the provisions of the earlier Acts, that the policy of the legislature has been throughout to protect the small charities from the exhaustion by litigation to which formerly they were so much subject; and there is nothing therefore to lead us to believe that it could be intended by this section that the right of appeal given to two inhabitants should extend to cases in which the income was below the prescribed amount of 50*l.*

Some attempt has been made on the part of the respondents to show that the income in this case was above that amount. But the respondents' evidence on this subject point only to the income

which might be made of the property, and not to the income
* 596 it actually * produces. It is not disputed that the actual income of these charities was less than the prescribed amount; and the case, I think, must be dealt with according to the actual income only.

I do not think that the fact of the two charities being embraced in the same order makes any difference, and this suggestion on the part of the respondents therefore fails.

[His Lordship then, after saying that he had said nothing as to other points which had been raised in the argument, because if the conclusion at which his Lordship had arrived as to the right of appeal was well founded, those were points which in his Lord-

ship's judgment must rest with the Attorney-General or with the board of commissioners, and not with the Court, proceeded as follows: —]

I think that the order of the Master of the Rolls should be discharged, and that an order dismissing the petition presented by the respondents with costs should be substituted for it; but that there should be no costs of this appeal.

* TAYLOR v. MEADS.

* 597

1865. January 25, 27. February 11. Before the Lord Chancellor Lord
WESTBURY.

If a power be created to be executed by deed or instrument in writing, it may be well executed by will.¹

Under a power created either before or since the New Wills Act to appoint real estate by deed or will to be respectively signed, sealed, and delivered in the presence of and attested by three credible witnesses, a will executed in manner prescribed by that statute is a good execution of the power.

But where a power was created after the New Wills Act, to be executed by any instrument in writing, signed, sealed, and delivered in the presence of and attested by two credible witnesses: *Held*, that a will duly executed in conformity with the statute, but not sealed, was not an instrument by which the power could be duly exercised.²

A *feme covert*, where not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument *inter vivos* or will.³

THIS was an appeal by the plaintiff from the dismissal of his bill with costs by the Master of the Rolls under the circumstances herein after stated.

¹ See 4 Kent, 330, 331.

² See 4 Kent, 331, 332.

³ See *Hall v. Waterhouse*, 11 Jur. N. S. 361; 6 N. R. 20; 13 W. R. 633; *Porcher v. Daniel*, 12 Rich. Eq. 349; *Cutter v. Butler*, 25 N. H. 343; *Caldwell v. Renfrew*, 33 Vt. 213; *Burton v. Holly*, 18 Ala. 408; 2 Story Eq. Jur. § 1394, *et seq.*; *Johnson v. Gallagher*, 3 De G., F. & J. 494 and note (2); *Willard v. Eastham*, 15 Gray, 328; *La Touche v. La Touche*, 3 H. & C. 576, note at the end of the Am. ed.; *Bestall v. Bunbury*, 13 Ir. Ch. Rep. 549; *Lewin Trusts* (5th Eng. ed.) 552, 553; *Perry Trusts*, § 656; *Lechmere v. Brotheridge*, 32 Beav. 353; *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9.

Under the will of William Meads, made in 1841, and in the events which had happened at the date when Elizabeth Meads, the wife of Percy Meads, made her will as herein after mentioned, some freehold cottages were vested in trustees upon trust only for her (she being described in the will as the wife of Percy Meads), her heirs and assigns, and to be assigned, released, conveyed, or otherwise well and effectually assured by her to any person or persons whomsoever, his, her, or their heirs or assigns, in such manner as she should at any time or times, and notwithstanding her coverture, direct or appoint, by any instrument in writing to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses, and in default of such direction or appointment, and so far as the same should not extend, in trust only for her, her heirs and assigns for ever, with a declaration of the testator's express will and meaning to be that

* 598 she should, notwithstanding *her coverture, stand possessed of the property for her sole and separate use and benefit, and that the same should not in any manner be subject or liable to the debts, control, engagements, or interference of Percy Meads.

Elizabeth Meads never formally exercised her special power of appointment over the property, but by her will made in May, 1845, she gave and devised all her real and personal estate over which she had a disposing power to her husband Percy Meads, his heirs, executors, administrators, and assigns for ever absolutely.

Her will was executed with all the formalities required by the New Wills Act, 1 Vict. c. 26, but was not under the seal of the testatrix.

The testatrix died in November, 1845, and the legal estate in fee of the property was got in by her surviving husband, Percy Meads.

He died in July, 1860 ; and in 1862 the appellant, who was the heir-at-law of Elizabeth Meads, instituted this suit against the respondents, who were respectively tenant for life and tenant in fee in remainder of the property in question under Percy Meads's will as defendants, seeking a declaration that Elizabeth Meads's will did not operate as a valid execution of the power of appointment vested in her under William Meads's will, and that the appellant was entitled to the property as her heir-at-law, and for consequential relief.

The Master of the Rolls held that the will of Elizabeth Meads

operated as a valid execution of the power of appointment vested in her under William Meads's * will; and so holding * 599 dismissed the appellant's bill, as has been stated, with costs ; at the same time abstaining from giving any opinion upon a second question which had been argued before his Honor ; namely, whether the testatrix had not, under William Meads's will, a power of disposition over the property by will in default of her exercise of the special power of appointment by virtue of her separate estate in the property, and as an incident to that separate estate.

Upon the present appeal these two questions were both again argued.

Mr. Hobhouse and *Mr. Fischer*, for the appellant, on the authority of *Collard v. Sampson*, on appeal ; (a) *West v. Ray* ; (b) and the dicta ascribed to the Vice-Chancellor KINDERSLEY in the Law Journal report of *Orange v. Pickford*, (c) as overruling *Buckell v. Blenkhorn*, (d) contended that Elizabeth Meads's will was no exercise of the special power of appointment vested in her under William Meads's will ; and relying on *Peacock v. Monk*, (e) *Churchill v. Dibben*, (g) *Moore v. Morris*, (h) *Blatchford v. Woolley*, (i) *Lechmere v. Brotheridge*, (k) and distinguishing *Atchison v. Le Mann*, (l) and *Adams v. Gamble*, (m) and also relying on the New Wills Act, § 8, as remitting the case back to the 14th section of the Stat. 34 & 35 Hen. 8, c. 5, they also contended, that she * had no power of disposition over the * 600 property by any thing short of a deed duly acknowledged under the Statute for the Abolition of Fines and Recoveries, and that that was especially so in a case like this, where William Meads had actually given her a special power of disposition, if she was minded to dispose at all, and where the separate estate was an estate for the joint lives of herself and her husband only.

(a) 4 De G., M. & G. 224 ; S. C. in the Court below, 16 Beav. 543.

(b) Kay, 385.

(c) 27 L. J. (N. S.) Ch. 808. In Mr. Drewry's Report of this case, 4 Drew. 363, the dicta in question do not appear.

(d) 5 Hare, 181.

(i) 2 Dr. & Sm. 204.

(e) 2 Ves. 190.

(k) 32 Beav. 301.

(g) 9 Sim. 447, note.

(l) 23 L. T. 302.

(h) 4 Drew. 83.

(m) 11 Ir. Ch. 269 ; 12 Ir. Ch. 102.

Mr. J. W. Chitty, for the respondents, controverted each of these propositions; contending, as to the first, upon the authority of the New Wills Act, (a) and the Stat. 22 & 23 Vict. c. 35, (b) Sugden on Powers, (c) and *Countess Dowager of Roscommon v. Fowke*, (d) that Elizabeth Meads by her will had duly exercised the special power of appointment given to her by William Meads's will; and that the operation of the New Wills Act was only to be considered after the will itself had been construed according to the ordinary rules, as in cases under the Mortmain Act, of which *Tatham v. Drummond* (e) was the last example; and as to the second, that even if she had not exercised the special power, still her will was a good disposition of the property by virtue of the right of disposition which was inherent in her own separate estate, which was not limited in duration, as suggested on the other side, but extended to the fee of the property. On this point, in addition to the cases sought to be distinguished on the other side, he referred to *Pearcock v. Monk*, (g) *Fettiplace v. Gorges*, (h) *Sturgis v. Corp*, (i) *Minot v. Eaton*, (k) *Major v. Lansley*, (l) *Baggett v. Meux*, (m) and the dicta of Lord WESTBURY in *Thomas v. Jones*, (n) and Sugden on Powers. (o)

January 27.

Mr. Hobhouse, in reply upon the second point only, commented on the opinion in Mr. Fearne's Posthumous Works, (p) and *Baggett v. Meux*. (m)

At the conclusion of the arguments the Lord Chancellor reserved his judgment.

February 11.

THE LORD CHANCELLOR. — If a power be created to be executed by deed or instrument in writing, although the words seem to indicate instruments *inter vivos* only, yet it is settled that it may

(a) Sect. 10.

(b) Sect. 12.

(c) Pages 217, *et seq.*, 8th ed.

(d) 6 Bro. P. C. 158, ed. Toml.

(e) *Supra*, p. 484.

(g) 2 Ves. 190.

(h) 1 Ves. jun. 46.

(p) Page 332; referred to in the note to *Minot v. Eaton*, 4 L. J. 134, 138.

(i) 13 Ves. 190.

(k) 4 L. J. 134.

(l) 2 R. & M. 355.

(m) 1 Ph. 627.

(n) 1 De G., J. & S. 63, 81.

(o) Page 173, 8th ed.

be well executed by will. The reason is, that the will literally answers the description of an instrument in writing.

So if either before or since the Statute of Wills, (a) a power be created to appoint real estate by deed or will to be respectively signed, sealed, and delivered in the presence of and attested by three credible witnesses, it is clear that a will executed in manner prescribed by that statute would be a good execution of the power. This is by force of the 10th section of the statute, and not on the ground that the will answers the description in the power.

* In the present case, the power created in December, * 602 1841, is to be executed by an instrument in writing, signed, sealed, and delivered in the presence of and attested by two credible witnesses; and it is contended that a will duly executed in conformity with the statute, but not sealed, is an instrument by which the power may be duly exercised.

But the power is not in terms a power of appointment by will, and whether it has been duly executed by a will or not, depends on the inquiry whether the will answers the description of the required instrument contained in the power. This the will does not do if one of the requisite solemnities be wanting, and it is clear that the statute does not make it answer the description. Wherever the power is in terms a power to appoint by will, and the will is required to be under seal, the statute applies and makes the requisition null; but it does not apply where the power is to appoint by an instrument under seal, for no will can execute a power that requires an instrument in writing under seal, unless the will answers the description of such an instrument, which a will without a seal does not.

Attention to the original principle on which a will was held to be a good execution of a power of appointment by any instrument in writing; namely, that the will answers the description in the power, would have prevented all misapprehension. The statute applies to powers requiring specifically a will with the solemnities of sealing, in addition to those solemnities rendered necessary by the statute, and in such cases it declares that a will without such additional solemnities shall be sufficient, but it does not touch the case of a power requiring an instrument in writing, signed, sealed, and delivered. In such a case the only question is, whether

(a) 1 Vict. c. 26.

* 603 * the will be such an instrument, and no help can be obtained from the statute.

The difficulty does not arise from any uncertainty as to the principle, but from the reports of conflicting and inconsistent decisions. The decision on this point by Vice-Chancellor WIGRAM in *Buckell v. Blenkhorn*, (a) followed by the Master of the Rolls in *Collard v. Sampson*, (b) has, I think, been in effect overruled by the Lords Justices in the last case on appeal, (c) and by the Vice-Chancellor WOOD in the case of *West v. Ray*. (d)

I must direct, therefore, that the judgment of the Master of the Rolls be reversed.

This gives rise to the next question, upon which there has been no decision in the Court below ; namely, whether in a case where real estates are conveyed or devised to trustees in fee upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*. Can she convey the equitable fee without the necessity of the instrument being acknowledged in the manner required by the Statute for the Abolition of Fines and Recoveries ; and can she, during coverture, devise the equitable estate by a will executed in conformity with the statute ?

There is no difficulty as to the principle.

When the Courts of Equity established the doctrine of * 604 the separate use of a married woman and applied it * to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal *status*, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*.

To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was

(a) 5 Hare, 131.

(c) 4 De G., M. & G. 224.

(b) 16 Beav. 543.

(d) Kay, 385.

recognized and admitted from the beginning, until Lord THURLOW devised the clause against anticipation.

But it would be contrary to the whole principle of the doctrine of separate use to require the consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole lies between the married woman and her trustees; and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and when the trust thus created is clothed by the trustees with the legal estate the alienation is complete, both at law and in equity.

With regard to ordinary equitable estates belonging to * a *feme covert*, for example, where lands are given to * 605 trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee (who afterwards marries), equity follows the law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be conveyed *inter vivos* in the same manner as a legal estate: and in like manner an estate of this nature cannot be devised by a *feme covert*, for the incapacity to make a will of lands by the 14th section of the 34 & 35 of Hen. 8, c. 5, is in this respect not removed by the Act of 1 Vict. c. 26; but the interest created by the separate use is the creature of a Court of Equity, to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband and personal disability in the wife.

The violence thus done by Courts of Equity to the principles and policy of the common law as to the *status* of the wife during coverture is very remarkable, but the doctrine is established and must be consistently followed to its legitimate consequences.

It is right to advert in few words to the statute law and to the decided cases.

By the 14th section of the Statute of Wills, 34 & 35 Hen. 8, c. 5, it was enacted, that wills or testaments made of any manors,

lands, tenements, or other hereditaments by any woman *covert* should not be taken to be good or effectual in the law. This enactment, no doubt, referred to lands vested in a *feme covert* in fee-simple, and of which her husband was seised *jure uxoris*.

Courts of Equity appear to have considered it as not applicable * 606 to separate estate, which was unknown at the time of the passing of the statute.

Between that time and the Act of the 1 Vict. c. 26, the doctrine of the separate use was fully established, and the *feme covert*, when not restrained from alienation, was considered in equity as entitled to the same rights of alienation over her separate property as are possessed by persons *sui juris*.

Then followed the present Wills Act, 1 Vict. c. 26, by the 8th section of which it is enacted, that no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of the Act.

This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favour of the proposition that a *feme covert*, when not restrained from alienation, has in equity the same *jus disponendi* over her separate estate by deed or will as she would have if free from the disability of coverture.

In addition to *Peacock v. Monk*, (a) and the well-known decisions of Lord THURLOW, it is sufficient to refer to *Tullet v. Armstrong*, (b) *Baggett v. Meux*, (c) the judgment of the Lord Justice TURNER in *Atchison v. Le Mann*, (d) and, finally, to the recent case of *Adams v. Gamble*, (e) in the Court of Appeal in Ireland, where the point was expressly determined from the earlier decisions. Lord ST. LEONARDS, in his book on Powers, (g)

* 607 derived the same conclusion, which he states in these words: "Where a married woman has property settled to her separate use without any restraint on alienation, she is deemed a *feme sole*, and may dispose of it accordingly."

I must hold, therefore, that a *feme covert*, where not restrained from alienation, has, as incident to her separate estate and without any express power, a complete right of alienation by instrument *inter vivos* or will.

(a) 2 Ves. 190.

(b) 1 Beav. 1.

(c) 1 Ph. 627.

(d) 23 L. T. 302.

(e) 11 Ir. Ch. 269; 12 Ir. Ch. 102.

(g) Page 173, 8th ed.

It was contended at the bar that the effect of this devise was to give the married woman an estate to her separate use only during the joint lives of herself and her husband, with remainder to herself in fee. But that is not the true construction of the will; the estate given to Elizabeth Meads is one and entire, being the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman.

It was also contended that inasmuch as a special power of appointment was in terms given, no further power of disposition ought to be implied; but it is well settled that a special power of appointment does not derogate from the right of disposition which is incidental to ownership; and here the will of Mrs. Elizabeth Meads is a valid disposition, not as an exercise or by virtue of any power of appointment, but by virtue of that right of alienation which, when not prohibited, is incidental to the separate estate in fee.

I cannot, therefore, concur with the judgment of the *Master of the Rolls, or with the order which he has made, * 608 and which must be reversed, and in lieu thereof declare that the will of Elizabeth Meads was not a good execution of the power given to her to appoint by an instrument in writing to be by her signed, sealed, and delivered, but was a valid devise of the estate given to her and her heirs, and which it was declared by the will of the testator she should hold for her separate use, and dismiss the bill, without costs.

ROBSON v. FLIGHT.

1865. January 20, 23. February 11, 15. Before the Lord Chancellor Lord WESTBURY.

Where lands are devised to trustees in fee upon trusts or with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will.¹

A trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate may be performed by the heir. But whether a trust may be performed or a trust power exercised by the heir-at-law, which is obligatory on the trustees of the will, depends on the question whether in the exercise any thing has to be supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power.

A power to lease may be a trust power in the sense of its being the duty of the trustee to avail himself of it under proper circumstances; but it is to be exercised by a person selected for the purpose, and not by the individual on whom by reason of intestacy the law casts the estate.

Acceptance by an adult beneficiary after attaining majority of rent accruing under an invalid lease is not a confirmation of the lease or a bar to relief by having the lease set aside.

An assignee of a lease cannot set up the defence of purchase for valuable consideration without notice, where he buys under an engagement not to call for the lessor's title. In such a case he must have imputed to him the knowledge which on prudent inquiry he would have obtained.

THIS was an appeal by the plaintiffs from the dismissal of their bill by the Master of the Rolls.

The case in the Court below is reported in the 34th volume of Mr. Beavan's Reports. (a)

By the will, dated in 1818, of John Hall, the testator in
* 609 the cause, certain freehold property in the city of * London
was vested in two trustees in fee, upon trust as to one moiety
for the testator's son John Ebdell Hall for life, with remainder to

(a) Page 110.

¹ See *Tainter v. Clark*, 13 Met. 220; *Clark v. Tainter*, 7 Cush. 567; *Warden v. Richards*, 11 Gray, 277; *Perry Trusts*, §§ 499, 500; *Evans v. Chew*, 71 Penn. St. 47; *Waters v. Margerum*, 60 Penn. St. 39; *Treadwell v. Cordis*, 5 Gray, 341, 359; *Gray v. Henderson*, 71 Penn. St. 368; *Dunning v. Ocean Nat. Bk. City of N. Y.* 6 Lansing, 296.

his children, and as to the other moiety for the separate use of the testator's daughter Eliza Hall (who in 1837 married John Pendhoe Robson) for life, with remainder to her children; and the will contained directions (conveyed by the use of the words "shall and may") for leasing, vested in the two trustees and the survivor of them, and the executors or administrators of such survivor, during the minority or respective minorities of any person or persons for the time being entitled under the will, and afterwards in the same persons or person, but subject to the consent in writing of any person or persons for the time being entitled under the will to an estate or interest in any part or parts of the property for life.

Neither of the trustees would act in the trusts of the will. One of them died about a year and a half after the testator; and the other formally disclaimed by a deed executed in the following year. No new trustees had ever been appointed.

At the testator's death, which happened in May, 1826, the property was subject to a mortgage in fee made by him.

In November, 1836, John Ebdell Hall, who united in himself the characters of son and heir-at-law of the testator and administrator of his personal estate with his will annexed, and was also equitable tenant for life in one moiety of the property, and Eliza Hall, being the daughter of the testator and equitable tenant for life in the other moiety of the property, concurred in leasing the property for twenty-one years to one John Nicholson, in consideration of the surrender of the pre-existing * lease. This new lease * 610 afterwards became vested in one Thomas Russell.

Eliza Hall, then Eliza Robson, died in January, 1840; and in January, 1848, John Ebdell Hall granted a new lease of the property to Thomas Russell for twenty-one years, in consideration of the surrender of the lease of November, 1836. In 1856 this lease was assigned to the respondent John Cannon as a trustee for the respondent Thomas Flight, who purchased it subject to a condition precluding him from inquiring into his vendor's title prior to the lease of November, 1848.

John Ebdell Hall died in October, 1857, and the property then became vested in equal moieties in the appellants Elizabeth Ebdell Hall and John Ebdell Hall the younger, the infant children of John Ebdell Hall, on the one hand, and the appellant Eliza Robson the younger, who was the only child of Eliza Robson the testator's

daughter, on the other." The rents of the property had been duly received and applied since John Ebdell Hall's death for the benefit of the appellants, of whom Eliza Robson the younger had attained her majority in 1860.

In November, 1863, the property was taken by the London, Chatham, and Dover Railway Company under their compulsory powers, and they took possession upon deposits in the bank and the execution of bonds made in favour of the appellants Elizabeth Ebdell Hall and John Ebdell Hall the younger on the one hand, and the appellant Eliza Robson the younger on the other hand, and which respectively in their respective defeasances represented the interests of the respective obligors in the property as those of moieties subject to the lease of January, 1848.

This action on the part of the company led to the institution of this suit by the appellants as plaintiffs, against the respondents Thomas Flight, John Cannon, his trustee, Thomas Robson, the acting executor of John Ebdell Hall's will, and Richard Cumming, who claimed under the mortgagee of the property, as defendants, with the object of impeaching the lease of 1848 *in toto*, except so far as it operated as a demise of John Ebdell Hall's life-estate in a moiety of the property, and charging that unless the lease should be set aside the railway company would purchase and pay for the appellants' interests in the premises as if they were subject to the lease, whereby the value thereof would be greatly diminished, and that the respondent Thomas Flight would receive from the railway company purchase-money and compensation in respect of the full value of the lease; and that the appellants would not, until such lease should be set aside, be in a position to take proper steps for having the amounts of purchase-money and compensation payable to them by the railway company ascertained and paid.

The bill sought the execution of the trusts of the testator's will so far as regarded the particular property, the appointment of new trustees, a declaration that the plaintiffs were entitled to the property and the proceeds discharged from the lease, and that it might be set aside; and consequential relief.

The respondent Thomas Flight, by his answer, insisted on the validity of the lease as a good execution of the power of leasing in the testator's will; that he, the respondent, was a *bond* purchaser for valuable consideration without notice of

the appellant's title ; and that, under any circumstances, the appellant Eliza Robson the younger had confirmed the lease, and was debarred from the relief sought by the bill by reason of her receipt of her proportion of the rents since she attained her majority.

Mr. Southgate and *Mr. Bagshawe* appeared for the appellants.

Mr. Selwyn and *Mr. Hemming*, for the respondent Thomas Flight.

Mr. Kingdon, for the respondents Richard Cumming and Thomas Robson ; and

Mr. Woodroffe, for the respondent John Cannon.

The Attorney-General v. Lady Downing, (a) *Cole v. Wade*, (b) *Brown v. Higgs*, (c) *Bowes v. The East London Waterworks Company*, (d) *Stiles v. Cowper*, (e) *Doe d. Simpson v. Butcher*, (g) *Doe d. Martin v. Watts*, (h) *Cooke v. Crawford*, (i) *Lee v. Brown*, (k) *Nickisson v. Cockill*, (l) *Ware v. Lord Egmont*, (m) *Tasker v. Small*, (n) *Lady Langdale v. Briggs*, (o) *Rooke v. Lord Kensington* ; (p) Stat. 13 & 14 Vict. c. 60, § 14 ; 15 & 16 Vict. c. 86, § 49 ; Co. Litt. ; (q) Lewin on Trusts ; (r) Sugden on Powers, (s) were referred to.

* The scope of the arguments sufficiently appears from * 613 the judgment of the Lord Chancellor and from Mr. Beavan's Report. (t) At their close the Lord Chancellor reserved his judgment.

(a) Wilmot's Notes, p. 23.
(b) 16 Ves. 27.
(c) 8 Ves. 561.
(d) 3 Madd. 375 ; Jac. 324.
(e) 3 Atk. 692.
(g) Doug. 50.
(h) 7 T. R. 83.
(i) 13 Sim. 91.
(k) 4 Ves. 362.

(l) 3 De G., J. & S. 622.
(m) 4 De G., M. & G. 460.
(n) 3 M. & C. 63.
(o) 8 De G., M. & G. 391.
(p) 2 K. & J. 753.
(q) Page 52 b.
(r) Pages 536 *et seq.*, 4th ed.
(s) Pages 131-133, 714 *et seq.*, 8th ed.
(t) 34 Beav. 114-117.

February 11.

THE LORD CHANCELLOR. — Where lands are devised to trustees in fee upon trusts or with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will.

The reason is obvious. Such trusts and powers are supposed to have been committed by the testator to the trustees he appoints by reason of his personal confidence in their discretion, and it would be wrong to permit them to be exercised by the heir-at-law, who may be a person unknown to the testator, or in whom he has no confidence at all.

A trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate, may indeed be performed by the heir. It does not follow that a trust may be performed, or a trust power exercised by the heir-at-law, because it is obligatory on the trustees of the will. It depends on the question whether in the exercise any thing has to be
 * 614 * supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power.

In the present case, the Master of the Rolls has treated the proviso as to granting leases contained in this will as if it were a bare trust, and not a trust power requiring discretion in its exercise.

But in the execution of the duty or office of granting leases much judgment is required to be exercised. The fitness and responsibility of the lessee, the adequacy of the rent, the length of term to be granted under the circumstances, and the nature of the covenants, stipulations, and conditions which the lease should contain, are matters requiring knowledge and prudence. The power to lease may be a trust power, in the sense of its being the duty of the trustee to avail himself of it under proper circumstances ; but it is to be exercised by a person selected for the purpose, and not by the individual on whom by reason of intestacy the law casts the estate.

In my judgment, therefore, the lease in question, which must be taken as intended to be granted under the power, is void, as having been granted by a stranger to the power.

There is no authority to warrant my holding either that acceptance of rent by the adult plaintiff since the attainment by her of her majority in the year 1860 is a confirmation of the lease, or a bar to her obtaining relief in this suit.

An attempt is made by the defendant, the assignee of the lease, to set up the defence of a purchaser for valuable consideration without notice, but as he bought * under an engage- * 615 ment not to call for the lessor's title, he must have imputed to him the knowledge which, on prudent inquiry, he would have immediately obtained.

Therefore I reverse the decree of the Master of the Rolls, and declare that the lease must be taken as intended to be granted under the power of leasing contained in the will, but that such power was not vested in and could not be exercised by John Ebdell Hall, the heir-at-law of the testator; and that such lease is therefore void, and ought to be delivered up to be cancelled, and decree the same accordingly: but this decree is without prejudice to any other tenancy or right of occupation of the premises to which the defendant Mr. Flight may be entitled.

February 15.

The case was again mentioned on this day. And upon the application of *Mr. Kingdon*,

The Lord Chancellor, although of opinion that the respondent Richard Cumming was not a necessary party to the suit, directed the allowance of his costs.

[471]

1865. January 31. February 14, 28. Before the LORDS JUSTICES.

A domiciled Scotchman not in the service or employ of the Indian government went to India and resided there for the purposes of his private business, always, however, retaining the wish and intention of returning finally to Scotland: *Held*, that he never lost nor intended to lose his original Scotch domicile.¹ *Per* the Lord Justice TURNER: Domicile can only be changed *animo et facto*; and residence alone, although decisive as to the *factum*, is an equivocal act as to the *animus*.²

Domicile imports an abiding and permanent home, and not a mere temporary one. The acquisition of a new domicile involves the abandonment of the previous domicile, and to effect the change the *animus* of abandonment must be shown.³ Whether this intention of abandonment may not be inferred from long and continuous residence alone, in a case in which there may be no other circumstances indicative of the intention, *quære*.

The decisions as to the covenanted servants of the East India Company acquiring an Anglo-Indian domicile had no bearing on such a case as that before the Court.

There can be no change of domicile during infancy, and the lapse of seven years after attainment of majority would be too short a time to operate a change of domicile, in the absence of any evidence of an intention to change it.

THIS was an appeal by the petitioner William Fergusson from the dismissal with costs by the Master of the Rolls of a petition of rehearing presented by the appellant.

The rehearing sought by the petition thus dismissed was that of a petition which had been presented by Elizabeth Smith, and to

¹ See *Hoskins v. Matthews*, 8 De G., M. & G. 13, and note (1) and cases cited; *Dalhousie v. M'Douall*, 7 Cl. & Fin. (Am. ed.) 817, note (3) and cases cited; *Sears v. Boston*, 1 Met. 250; *Holmes v. Green*, 7 Gray, 299, 301; *Concord v. Rumney*, 45 N. H. 427, and cases cited; *Anderson v. Anderson*, 42 Vt. 350.

² *Shaw v. Shaw*, 98 Mass. 158, 160; *Bulkley v. Williamstown*, 3 Gray, 495; *Hegeman v. Fox*, 31 Barb. 475, 480, 481-484; *Harvard College v. Gore*, 5 Pick. 374; *Jennison v. Hapgood*, 10 Pick. 77; *Haldane v. Eckford*, L. R. 8 Eq. 641; *Udny v. Udny*, L. R. 1 H. L. Sc. 458; *Wilbraham v. Ludlow*, 99 Mass. 587; *Kirkland v. Whately*, 4 Allen, 464.

³ See BACON, V. C. in *Brunel v. Brunel*, L. R. 12 Eq. 301; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Hallet v. Bassett*, 100 Mass. 170, 171; *White v. Brown*, 1 Wallace Jr. 265. The burden of proving a change is said to be on the party who alleges it. *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307.

which the Attorney-General, as representing the Crown, had been the sole respondent.

Elizabeth Smith was the English executrix of the will of John Smith, and the administratrix of the estates of Eleanor Smith and Mungo Smith, his two deceased infant children, and to her, as representing these children, the payment of certain funds had been decreed by the Court at the hearing of the cause. (a) With respect to these funds, however, a dispute had arisen between her * and the Crown as to their liability to legacy * 617 duty, a question which depended for its solution upon the further question whether the domicile of the children was Anglo-Indian or Scotch, which again depended upon the question whether the domicile of John Smith was Anglo-Indian or Scotch. If the former, as Elizabeth Smith contended, legacy duty was not payable; if the latter, as the Crown contended, it was; and the object of Elizabeth Smith's petition was to obtain the funds out of Court free from legacy duty, on the ground that the domicile in question was Anglo-Indian.

Upon hearing the petition the Master of the Rolls decided in favour of the Scotch domicile, and ordered the legacy duty to be paid; and subsequently, inasmuch as, in the event of the children's domiciles being Scotch, their shares (they having died intestate) passed to their collateral relations, the administrations granted to Elizabeth Smith in respect of their estates were recalled, and new letters of administration were granted to Margaret Jopp, who was a married sister of theirs.

The appellant was the surviving Indian executor of John Smith's will, and intervening in the suit he obtained from the Court leave to present, (b) and he accordingly presented, the petition of rehearing, the dismissal of which formed the subject of the present appeal.

The case is reported below in the 34th volume of Mr. Beavan's Reports. (c) The following facts, taken in the main from the Master of the Rolls' judgment, supplement those referred to in the judgments of the Lords Justices.

* John Smith was born in Scotland in 1786. In 1805 * 618 he went to India, and was engaged as a clerk in the banking and mercantile firm of Fergusson & Co. at Calcutta. In 1807

(a) See *Jopp v. Wood*, 28 Beav. 53; 2 De G., J. & S. 323.

(b) See *Jopp v. Wood* (No. 2), 33 Beav. 372.

(c) Page 88.

he became an indigo planter. In 1814 he returned to the business of Fergusson & Co., and became a partner in the firm. In January, 1816, he married in Calcutta, and in his marriage settlement was described as of that place. On the 6th of November, 1817, Eleanor Smith, one of the children whose domicile was now in question, was born, and she died on the 13th of July, 1818.

In July, 1819, John Smith visited Scotland with his wife, and while there, in October, 1819, he executed a bond, and in December, 1819, he made a testamentary disposition of his property, in each of which he described himself as "of Calcutta," but "presently residing in Ayr." In this testamentary disposition he directed his trustees, in case he should happen "to die abroad," to pay his wife's expenses "to this country." In 1819, also, he obtained plans for the improvement of his house at Drongan, in Ayrshire, which was the old family mansion. In 1820 he was enrolled a freeholder of Ayrshire.

In October, 1820, he returned to Calcutta, and on the 23d of August, 1823, Mungo Smith, the second infant child whose domicile was now in question, was born, and he died on the 3d of August, 1824.

In 1825 John Smith's wife set out on her return to England; she died on her voyage in May of that year near the Mauritius, and in the same year her husband erected a monument to her in Calcutta. A year before his death he sent wine to Drongan for his own consumption.

* 619 * On the 3d of December, 1830, John Smith himself died of cholera at Calcutta.

It was alleged by the appellant that for some years before this event the affairs of the firm of Fergusson & Co., in which both he and John Smith were partners, had been in a critical state, and that the firm actually failed three years after the death of John Smith, and that the latter could not have imagined himself likely soon to return to this country with a fortune.

Mr. Hobhouse and *Mr. H. M. Jackson*, for the appellant, contended that, on every definition which had been given of domicile, John Smith had lost, as he had in fact abandoned, his original Scotch domicile, and had before 1814 acquired an Anglo-Indian one; the case being in this respect really concluded by the decisions with reference to the East India Company's servants; and

that, having so lost his original Scotch domicile and acquired an Anglo-Indian one, he had never resumed the original domicile.

Mr. Selwyn, Mr. Serjeant Tindal Atkinson, and Mr. B. L. Chapman, for Margaret Jopp, and *Mr. Hanson*, for the Crown, contended that John Smith had never lost his original Scotch domicile, and that the authorities as to the East India Company's servants had no pertinence to the case of a person going out to India to make his fortune by private mercantile enterprise, without any obligation to stay for any definite length of time.

Mr. Hobhouse, in reply.

Reference was made to *Bruce v. Bruce*, (a) *Munroe v. * Douglas*, (b) *Somerville v. Somerville*, (c) *Munro v. * 620 Munro*, (d) *Forbes v. Forbes*, (e) *Lord v. Colvin*, (g) *Moorhouse v. Lord*, (h) *Cockrell v. Cockrell*, (i) *Attorney-General v. Fitzgerald*, (k) *Lyall v. Paton*, (l) *Allardice v. Onslow*, (m) *Drevon v. Drevon*, (n) *In the Goods of Raffeneil*, (o) *Maxwell v. M'Clure*, (p) *Attorney-General v. Dunn*, (q) *Whicker v. Hume*, (r) *Laneuville v. Anderson*, (s) *Attorney-General v. Rowe*, (t) *Hodgson v. De Beauchesne*, (u) *Attorney-General v. Kent*, (v) *In re Capdevielle*, (x) *Aikman v. Aikman*, (y) *In re Steer*, (z) *Bempde v. Johnstone*, (aa) *Marsh v. Hutchinson*, (bb) *Stanley v. Bernes*; (cc)

(a) 2 Bos. & P. 229, n.

(b) 5 Madd. 379.

(c) 5 Ves. 750.

(d) 7 Cl. & Fin. 876.

(e) Kay, 341.

(g) 4 Drew. 366.

(h) 10 H. L. Cas. 272.

(i) 4 W. R. 730.

(k) 3 Drew. 610.

(l) 25 L. J. N. S., Ch. 746.

(x) 2 H. & C. 985. The reporters have learnt with reference to this case that the Commissioners of Inland Revenue subsequently forbore to press for the duty to which the decision of the Court of Exchequer adjudged them entitled, in consequence of the decision in *Wallace v. The Attorney-General*, L. R. 1 Ch. App. 1, overruling the case of *Re Wallop's Trust*, 1 De G., J. & S. 656, so far as it applied to the case of *In re Capdevielle*.

(y) 3 Macq. 854.

(z) 3 H. & N. 594.

(aa) 3 Ves. 198.

(m) 10 Jur. N. S. 352.

(n) 12 W. R. 946.

(o) 3 Sw. & Tr. 49.

(p) 6 Jur. N. S. 407.

(q) 6 M. & W. 511.

(r) 7 H. L. Cas. 124.

(s) 9 Moo. P. C. C. 325.

(t) 1 H. & C. 31.

(u) 12 Moo. P. C. C. 285.

(v) 1 H. & C. 12.

(bb) 2 Bos. & P. 226.

(cc) 3 Hagg. 373.

Story's Conflict of Laws, (a) Code Civil, (b) Phillimore's Law of Domicile. (c)

February 28.

THE LORD JUSTICE KNIGHT BRUCE. — Had Mr. Smith been in the employ of the government in India, I assume from the
 * 621 authorities that, to say the * least, the burden would have been upon those asserting that his domicile remained Scotch at his death to establish that assertion.

But he never was in the service or employ of the Indian government. He resided in India, while there, for the mere purpose of his private business, and appears also to have retained the wish and intention of returning finally to Scotland. His correspondence and conduct appear to prove that distinctly. A permanent residence in India seems never to have been in his contemplation.

It appears to me that his domicile of origin was never lost or intended to be lost; and that the conclusion of the Master of the Rolls was right. Some, at least, of Lord KINGSDOWN's observations in advising the House of Lords upon the case of *Moorhouse v. Lord* (d) seem especially apposite to the present contention.

THE LORD JUSTICE TURNER. — This is a question of domicile, as to which the Master of the Rolls has decided that Mr. Smith was domiciled in Scotland.

I concur in that decision.

The point principally relied upon by the appellant in support of his contention that there was a change of domicile from Scotland to India was the long continued residence of the testator in the latter country.

But nothing is better settled with reference to the law of domicile than that the domicile can be changed only *animo et facto*, and although residence may be decisive as to the *factum*, it can-
 * 622 not, when looked at with reference * to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special pur-

(a) Section 41.

(c) Page 13.

(b) Art. 102.

(d) 10 H. L. Cas. 291.

pose, or he may have elected to make the place his temporary home. But domicile, although in some of the cases spoken of as "home," imports an abiding and permanent home, and not a mere temporary one. The effect of residence or domicile is well explained by Dr. Lushington in his very able judgment in *Hodgson v. De Beauchesne*, (a) and I entirely agree in the opinion which is there expressed upon the subject.

In considering cases of this description it must be borne in mind that the acquisition of a new domicile involves an abandonment of the previous domicile; and in order, therefore, to effect the change, the *animus* of abandonment, or, as Lord CRANWORTH has strongly expressed it, (b) the intention *exuere patriam* must be shown. Whether this intention of abandonment may not be inferred from a long and continuous residence alone, in a case in which there may be no other circumstances indicative of the intention, is a question which in this case it is unnecessary to decide, and on which, therefore, I give no opinion. Such a case can very rarely, if ever, occur.

In the course of the argument on the part of the appellant, reliance was placed on the cases which have been decided as to covenanted servants of the East India Company.

* But there are considerations connected with that class * 623 of cases which have no bearing on a case like the present.

At the time when those cases were decided the government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had contracted obligations with such government for service abroad could not reasonably be considered to have intended to retain their domicile here. They in fact became as much estranged from this country as if they had become servants of a foreign government.

There are several minor circumstances on which the appellant also relied; the purchase of land in India by Mr. Smith when he embarked in the indigo trade, his having retained his house in Calcutta during his temporary visit to this country in 1819, and the fact of his having been described as "of Calcutta" in his will

(a) 12 Moo. P. C. C. 285.

(b) Whicker v. Hume, 7 H. L. Cas. 124, 159; Moorhouse v. Lord, 10 H. L. Cas. 272, 283.

and in the other instruments which he executed on the occasion of that visit.

But the purchase of land in India was a necessary incident of the trade in which Mr. Smith was then engaged. His retaining the house in Calcutta was the natural consequence of his intending to return to that place, and the description of him in his will and in the other instruments was almost necessary for the purpose of identifying him. These circumstances, therefore, in my judgment, are but of little if any weight.

Had, then, the case rested here, I should have felt scarcely a doubt upon it, but any possible doubt which there might otherwise have been seems to me to be wholly removed by the evidence on the part of the respondents.

* 624 * It appears by that evidence that Mr. Smith was the only son of a Scotch laird, and the proprietor of a considerable estate: that he went to India in 1805, when a minor, and he did not attain his majority till 1807: that upon the death of his father in 1814 he became entitled to the surplus proceeds of the sale of the paternal estate, which was then heavily incumbered: that the estate, however, remained unsold; but that immediately upon the death of his father he wrote a letter to his mother, indicating strongly his intention of ultimately returning to Scotland: that in 1819 he came over to that country, and during his residence there took an active part in the management and conduct of the estate; and that from the time of his return to India after this visit till the time of his death he kept up a constant correspondence with the agents of the estate, in the course of which he constantly referred to his return, directed different parts of his estate to be planted, and mentioned his intention of building upon it: that he remitted money to be applied in paying off the charges upon the estate, and actually purchased an adjoining property; and that he caused himself to be put upon the roll of freeholders of his county.¹

¹ See *In re Steer*, 3 H. & N. 594 (Am. ed.) 599, note; *Plummer v. Brandon*, 5 Ired. Eq. 190. As to the admissibility of letters written by a party whose domicile is in question, and his declarations affecting that question, see *Thorn-dike v. Boston*, 1 Met. 242; *Kilburn v. Bennett*, 3 Met. 199; *Cole v. Cheshire*, 1 Gray, 441; *Monson v. Palmer*, 8 Allen, 552; *Wilson v. Terry*, 9 Allen, 214; *Reeder v. Holcomb*, 105 Mass. 93; *Beason v. State*, 34 Miss. 602; *Smith v. Croom*, 7 Florida, 81.

These are facts which, in my judgment, conclusively show that Mr. Smith, so far from having abandoned his domicile in Scotland, which, it is to be observed, was his domicile of origin, and therefore not so readily to be considered as abandoned as an acquired domicile,¹ desired at all times to retain it.

It was attempted on the part of the appellant to displace the weight of this evidence, by suggesting that Mr. Smith acquired a domicile in India before 1814, and thus to bring the case within the range of the authorities * in which it has been * 625 held that a domicile cannot be resumed by intention merely.

But I see no foundation for this suggestion. The evidence shows that there was correspondence before 1814 of similar purport to that which I have already referred to. Besides, there could have been no change of the domicile before 1807, when the minority ceased; and the interval between 1807 and 1814 would, in my judgment, have been too short to have operated to change the domicile in the absence of any evidence of intention to change it.

This appeal appears to me to be wholly unfounded, and should, I think, be dismissed, with costs.

* HANMER v. CHANCE.

* 626

1865. February 8, 9. March 22. Before the Lord Chancellor Lord WESTBURY.

The first section of the Prescription Act (2 & 3 Will. 4, c. 71), which relates to profits *à prendre*, applies only to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to the case of a right claimed by a copyholder in his own tenement according to the custom of the manor.

The meaning of the 6th section of the Act is, that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years.

But where there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant.

Customary rights of copyhold tenants differ from prescriptive rights; the former

¹ See *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307; *First Nat. Bank New Haven*, 35 Conn. 351.

are usages which apply to a number of persons in a certain district or locality, but prescriptive rights are claimed by one or more person or persons as existing in themselves or their ancestors, or as attached to a particular estate.

The law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be rightly drawn. It is the province of a jury to draw these conclusions of fact.

Circumstances under which the Court sitting as a jury found the existence of a custom in a copyhold manor authorizing the tenants thereof to dig for and get sand, sandstone, gravel, and clay from their respective tenements, and to cart and carry away the same on to other lands, and to use or sell the same either on or off the manor without license from the lord.

There must be one rule applicable to ecclesiastical persons as well as to lay when the question is whether rights belonging to them have or have not been lost by negligence.

THIS was an appeal by Messrs. Chance, the principal defendants, from the grant by the Vice-Chancellor Sir WILLIAM PAGE WOOD at the hearing of the cause of a perpetual injunction to restrain them from digging, raising, or carrying away, or from causing or ordering or consenting to the digging, raising, or carrying away by any other persons or person, of any sand from or out of two closes of land held by them as copyholders of the manor; with ancillary relief.

The principal respondent, Sir John Hanmer, whose suit this was, was the owner in fee and lord of the manor of Leighton * 627 Buzzard, in Bedfordshire, having as lessee * thereof under the dean and canons of Windsor, purchased in 1863 the reversion from the Ecclesiastical Commissioners, in whom, as representing the dean and canons, it had vested.

The appellants were copyholders of the manor, having purchased their tenements in 1842.

The facts of the case sufficiently appear from the Lord Chancellor's judgment.

The Attorney-General (Sir ROUNDALL PALMER), *Mr. Giffard*, and *Mr. Walford*, for the principal respondent, and *Mr. Decimus Sturges*, for defendants in the same interest as the principal respondent, in support of the decree in the Court below, relied upon *Bailey v. Appleyard*. (a) They further contended that the custom

(a) 8 Ad. & E. 161.

alleged by the appellants was bad; and that the late lords of the manor, being ecclesiastical persons, were not bound to be so vigilant in looking after their rights as laymen.

Sir Hugh Cairns and *Mr. Sargeant*, for the appellants, distinguished *Bailey v. Appleyard*. (a) They defended the validity of the custom alleged by them; and further contended that the appellant while tenant only of the manor was bound to be vigilant in looking after the rights of the lords of the manor.

The Bishop of Winchester v. Knight, (b) *The Marquis of Salisbury v. Gladstone*, (c) *Gateward's Case*, (d) *Clayton v. Corby*, (e) *The Attorney-General v. Mathias*, (g) *Daniel v. North*, (h) *Bright v. Walker*, (i) * *Wood v. Veal*, (k) *Papendick v. * 628 Bridgwater*, (l) *Murgatroyd v. Robinson*, (m) *The King v. Jolliffe*, (n) *Jenkins v. Harvey*, (o) *Doe v. Sisson*, (p) *Roe v. Jeffery*, (q) *Blewett v. Tregonning*, (r) *Co. Litt.*, (s) were also referred to.

The Attorney-General, in reply.

March 22.

THE LORD CHANCELLOR. — The plaintiff is the lord of the manor of Leighton Buzzard. The defendants are some of the copyhold tenants of the manor.

The plaintiff's case is that which is thus stated in the 8th and 9th paragraphs of his bill: —

“ There is a stratum of valuable silver vitreous sand which runs under some of the copyhold lands held of the manor of Leighton Buzzard, and which passes under the several before-mentioned closes of land. There is not any custom of the manor authorizing the copyhold tenants of the manor to open mines or quarries upon

(a) 8 A. & E. 161.

(b) 1 P. Wms. 406.

(c) 9 H. L. Cas. 692.

(d) 6 Rep. 59 b; Cro. Jac. 152.

(e) 5 Q. B. 415.

(g) 4 K. & J. 579.

(h) 11 East, 372.

(i) 1 C., M. & R. 211.

(k) 5 B. & Ald. 454.

(l) 5 E. & B. 166.

(m) 7 E. & B. 391.

(n) 2 B. & C. 54.

(o) 1 C., M. & R. 877.

(p) 12 East, 62.

(q) 2 M. & Sel. 92.

(r) 3 A. & E. 554.

(s) Page 626.

the lands held by them as such copyhold tenants, or to dig and carry away the soil thereof, or the sand, clay, gravel, or minerals under the same."

The defendants' case is that which is thus stated in the 8th paragraph of their answer:—

"There is a custom of the said manor authorizing all
* 629. * the copyhold tenants of the same to dig for and get sand, sandstone, gravel, and clay from their respective tenements held of the said manor, and to cart and carry away the same on to other lands holden or not holden of the said manor, and to use or sell the same either on or off the said manor without license from the lord thereof, and without making any payment in respect of the said sandstone, gravel, or clay so carted or carried away, used or sold."

The question therefore is one of fact.

The Vice-Chancellor offered an issue to the parties to be tried before a jury, which was declined, and his Honor therefore tried the cause as a jury would do.

The white vitreous sand to which the suit relates is a valuable article of commerce, and has been greatly in demand of late years for the manufacture of glass.

The evidence does not carry back the practice of digging for this particular sand within the manor more than twenty-seven years before the filing of the bill. The Vice-Chancellor held the evidence to be insufficient to prove a custom, and his Honor is stated to have ruled that although there was very considerable evidence of the digging of this vitreous sand to a very large extent for the last twenty-seven years, yet that a custom of this nature, according to the case of *Bailey v. Appleyard*, (a) which his Honor thought was on all-fours with the present case, must clearly, under the Act 2 & 3 Will. 4, c. 71, commonly called
* 630. the Prescription Act, (b) be proved * for thirty years, or

(a) 8 A. & E. 161.

(b) The sections of this Act referred to by the Lord Chancellor in his judgment are, so far as they are material, respectively as follows:—

Sect. 1. . . . "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or

else all the evidence up to any time short of that period was of no avail in establishing the custom. And his Honor came to the conclusion that as regards the vitreous sand, which is the subject of the greater part of the evidence in the case, it was clear that the evidence could not be sufficient.

With great respect to his Honor there seems to be some error in this part of the judgment.

First, the question in the cause is, not as to a custom to dig and sell this particular sand, but as to a custom for copyholders to get and sell sand, gravel, and clay from within their own copyhold lands held of the manor; and therefore the evidence as to the fact of this particular sand having been dug and sold in large quantities during the last twenty-seven years was part only of the larger body of evidence adduced to prove a custom for *the * 631 copyholders to dig and sell sand generally, which would include the right to dig and sell this particular sand.

And, secondly, it is clear on the language of the Prescription Act, and has been so settled by decision, that the 1st section, which relates to profits *à prendre*, applies only to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another; and has no application to the case of a right claimed by a copyholder in his own copyhold tenement according to the custom of the manor.

With respect to the 6th section of the statute, the meaning seems to be that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for

benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated."

Sect. 6. . . . "In the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim."

less than the prescribed number of years ; but where there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant.

Customary rights of copyhold tenants differ from prescriptive rights. The former are usages which apply to a number of persons in a certain district or locality, but prescriptive rights are claimed by one or more person or persons as existing in themselves and their ancestors, or as attached to a particular estate.

When the supposed obstacle from the Prescription Act is removed there seems to be but little difficulty in the case.

* 632 * On the part of the defendants a considerable body of evidence in support of the alleged custom has been adduced, and it has not been met by any counter-evidence on the part of the plaintiff.

First, as to the vitreous sand, Mr. Chance, a glass manufacturer, proves that in the years 1836, 1837, and 1838, he and his partners bought upwards of 1000 tons of this sand from one of the copyholders of the manor, and that they afterwards bought his copyhold for the sole purpose of getting this sand, and that between 1842 and 1858 upwards of 50,000 tons had been dug and taken away by them from the land so bought.

A gentleman named Adams, who has resided or held property within the manor for the last fifty-five years, and has been a copyholder for the last twenty-eight years, proves that for the last twenty years he has raised and sold sand from his copyhold tenement in considerable quantities ; and he deposes that it has always been generally reputed that the copyholders of the manor had the right of digging sand and gravel from their respective copyholds, and of carrying away the same as they might think proper. He further states that no royalty has ever been paid to the lord or license obtained from him for any such acts.

The next witness, a Mr. Dumpleton, a tradesman at Leighton Buzzard, proves that he has been a copyholder of the manor for the last forty-seven years, and that it has been the custom of the manor ever since he was first acquainted with it for the copyholders thereof to dig sand, sandstone, and gravel from their copyholds within the manor, and to carry away the same as they pleased ; and that almost ever since he had been such copyholder,

he had known large quantities of sand to have been dug
* from time to time from the copyholds, and removed from * 633
the manor. The witness then deposes to the fact that he
himself had from time to time during the last thirty years had
considerable quantities of sand and sandstone dug out of a garden
belonging to him, and being part of the copyholds of the manor ;
and that he had also dug gravel in large quantities from a copyhold
close within the manor, and sold it to the surveyors ; and that he
knew that a great deal of gravel got from copyhold lands of the
manor had for many years been sent from Leighton Buzzard to
other places.

There are several other witnesses whose testimony is not open to
any remark, and who also prove that sand, sandstone, gravel, and
clay have been for many years openly dug and raised from their
copyhold tenements by the copyholders, and sold and carried away
from the manor.

There are also several witnesses who prove the general reputa-
tion within the manor, that the copyholders had the right of dig-
ging and carrying away of sand from their tenements.

None of these witnesses were cross-examined by the plaintiff,
nor did he desire to have them personally examined before the
Vice-Chancellor.

It can hardly be said that there is any counter-evidence on the
part of the plaintiff.

The present deputy steward of the manor is not called by him.

His solicitor, Mr. Jones, a gentleman resident in London, and
who is the present steward of the manor, states that from
his knowledge of the manor and the customs * of the same, * 634
he verily believes that there is not any custom of the manor
authorizing the copyhold tenants to open mines or quarries upon
their copyholds, nor to dig and carry away the soil thereof, or the
sand, clay, gravel, or minerals under the same.

The belief of this witness is immaterial, for the facts on which
it is founded are not stated ; and further, the custom which the
witness does not believe to exist is not the custom stated by the
defendants.

In addition, there is the evidence of a solicitor who assisted a
former steward of the manor, and who deposes that he never heard
of the alleged custom authorizing the copyholders to dig from their
copyhold tenements either sand, gravel, sandstone, or clay.

There is also the evidence of the chapter clerk of the dean and canons of Windsor, the late owners of the manor, who deposes that he has never been aware of any alleged custom or other claim on the part of the copyholders of the manor tending to abridge the right of the lords of the manor for the time being to the soil thereof, and that in the recent sale to the plaintiff the mines and minerals within the manor were taken into account in fixing the value and price to be paid.

Similar evidence is given by the land agent and land surveyor employed by the dean and canons in their recent sale to the plaintiff.

In addition, evidence was given by the plaintiff from the court-rolls of six presentments made by the homage of a Court holden on the 27th June, 1709, of which the first five relate expressly to the common heath and commonable places within the manor, * 635 and the sixth was * in these words: "Item; We order that no person or persons shall dig any clay or sand within this manor to sell, excepting upon a piece of ground called Lamsey, unless it be for the use of the inhabitants of Leighton Buzzard and Heath and Reach, upon pain to forfeit and pay to the lord of this manor for every default 1*l.* 19*s.* 11*d.*," — which is the same penalty as that imposed for each of the five previously described trespasses on the common heath. The defendants contended, and I think rightly, that the sixth presentment, like the rest, applied only to the common heath and commonable places within the manor. It is proved by the defendants, as might be inferred from the entry, that the piece of ground called Lamsey was at this time part of the waste of the manor. If, therefore, these entries relate, as I think they do, to the waste or commonable places only of the manor, they appear to me, in conjunction with the oral testimony, to support the conclusion that the right of the copyholders to dig sand and clay within their own tenements was not disputed.

The Vice-Chancellor appears to have been much influenced in his opinion by the extent of the manor and the insufficiency of the defendants' evidence to prove a custom extending over so large a district. But the custom of digging would be exercised only where the veins or beds of sand, gravel, and clay are found, and there is no evidence that they exist generally throughout the manor.

The law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the pre-

sumption or inference of the fact of a custom may be rightly drawn. It is the province of a jury to draw these conclusions of fact, but in several reported cases the Courts have refused to disturb the verdicts of *juries as to a custom in a manor * 636 even when founded on very slender evidence.

Thus in *Doe v. Mason*, (a) a single admittance to a copyhold was evidence to prove the custom of a manor for lands to descend to the youngest nephew ; and although there was evidence to the contrary from a presentment of the homage entered on the court-roll, the Court of Common Pleas refused a new trial. So in the case of *Roe v. Jeffery*, (b) a single instance of a surrender in fee by tenant in special tail of a copyhold estate was considered evidence sufficient to prove a custom within the manor to bar entails by surrender, although there was proof of the fact of a recovery having been suffered at an earlier period by a tenant in tail to bar the entail, and it was said by Lord ELLENBOROUGH, that although it is true that one act undisturbed does not make a custom, yet it will be evidence of a custom ; and Mr. Justice LE BLANC said, it was a fact on which it was competent for a jury to find such a custom. There are other decisions to the same effect.

I cannot therefore concur with the Vice-Chancellor in his opinion of the insufficiency of the evidence in the present case ; and sitting as a jury I feel bound to give effect to it and to accept it, being wholly uncontradicted, as sufficient evidence of the alleged custom.

The acts of the copyholders have been open and notorious, and it is hardly to be supposed, if there was no custom, that they would have remained unchallenged by the lord, inasmuch as if unwarranted they would have formed a cause of forfeiture by the copyholders of their tenements, and the lord therefore has always had the * strongest interest to take advantage of the * 637 acts done. This raises a very strong presumption against the lord, and would render even slight evidence of a cogent character.

I cannot listen to the suggestion that the late lords of the manor were ecclesiastical persons, and negligent of their rights. There must be one rule applicable to the ecclesiastical person as well as to the lay.

(a) 3 Wilson, 63.

(b) 2 M. & Sel. 92.

In the present case I am of opinion, that a jury would be not only warranted but bound upon the evidence of the defendants to find in favour of the custom, and I must, therefore, reverse the decree of the Vice-Chancellor, and dismiss the bill, with costs.

* 638 * CHINNOCK v. THE MARCHIONESS OF ELY.

1865. February 4, 11. March 22. Before the Lord Chancellor Lord WESTBURY.

An intended vendor of freehold property who had bought under stringent special conditions instructed her solicitor, in conformity with his own advice, to sell the property subject to the same or similar conditions as or to those under which she had bought. Acting under this limited authority, the solicitor gave the necessary instructions by letter to a house agent, whom at a personal interview on the same day he expressly forbade to sign any thing, saying that any contract would have to be prepared by the solicitor's firm. An intended purchaser, by letter handed to the agent, agreed to give the price which the agent was authorized to accept (not, however, simply accepting the terms of the prior letter), and at the same time requested an acceptance of this offer by the agent in writing, a request to which the agent declined to accede, giving as his reason the prohibition under which he was from entering into any contract. The intended vendor at this stage of the proceedings repented of her intention to sell, but was willing to proceed if the solicitor was of opinion that she could not honourably recede. A personal interview having taken place between him and the intended purchaser, who declined to give up the intended purchase, the solicitor wrote to the intended purchaser a letter saying that his firm were instructed to proceed with the sale, and adding that the draft contract was being prepared, and would be forwarded for approval. Disputes having subsequently arisen, and the intended purchaser having filed a bill for specific performance: *Held*, reversing the decision of the Court below, that, —

1. At the date of the letter of the intended purchaser to the agent no contract was in existence, and that that letter, coupled with the prior letter of the solicitors to him, did not amount to a sufficient memorandum in writing of the terms of a contract.
2. The letter of the solicitors to the intended purchaser was no recognition of the fact that there had been a complete sale, and did not amount to an acceptance of the terms stated by the intended purchaser in his letter to the agent, but merely to either a conditional acceptance of the intended purchaser's terms, subject to a draft contract being agreed to, or an expression of willingness to continue the interrupted negotiation, and for that purpose to prepare a form of agreement.

3. If the letter of the solicitors to the intended purchaser had had the effect which the Court decided that it had not, it would not have been binding on the intended vendor, as being beyond the authority vested by her in her solicitor.

An agreement is the result of the mutual assent of two parties to certain terms: and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract.¹

But where to a proposal or offer an assent was given subject to a provision as to a contract: *Held*, that the stipulation as to the contract was a term of the assent, and there was no agreement independent of that stipulation.²

THIS was an appeal by the defendant from a decision of the Vice-Chancellor Sir WILLIAM PAGE WOOD, whereby his Honor at the hearing of the cause decreed with costs the specific performance by the appellant of * an agreement contained in * 639 certain letters of the 11th and 19th of November, 1863, herein after more particularly referred to.

The case in the Court below is reported in the 2d volume of Messrs. Hemming & Miller's Reports. (a)

From the Lord Chancellor's judgment and from the report just referred to the facts of the case, as also the scope of the arguments, will be seen.

Mr. Rolt, Sir Hugh Cairns, and Mr. Fry appeared for the respondent, the plaintiff in the suit, and

Mr. G. M. Giffard and Mr. W. Barber, for the defendant, the appellant.

In addition to such of the authorities referred to in the Court below as were again referred to on the appeal; viz., — *Ridgway v. Wharton*, (b) *Honeyman v. Marryatt*, (c) *Stratford v. Bosworth*, (d) *Kennedy v. Lee*, (e) *Fowle v. Freeman*, (g) and *Thomas v. Dering*, (h) — reference was made to *Heyworth v. Knight*, (i)

(a) Page 220.

(d) 2 V. & B. 341.

(h) 1 Keen, 729.

(b) 6 H. L. Cas. 238.

(e) 3 Mer. 441.

(i) 17 C. B. (N. S.) 298.

(c) 6 H. L. Cas. 112.

(g) 9 Ves. 351.

¹ See 1 Dart V. & P. (4th Eng. ed.) 211.

² See *Rummens v. Robins*, 3 De G., J. & S. 88; *Potts v. Whitehead*, 5 C. E. Green (N. J.), 55, 58; S. C., 8 C. E. Green, 512; 1 Sugden V. & P. (8th Am. ed.) 132 and n. (d); 1 Chitty Contr. (11th Am. ed.) 15, 16.

Wood v. Midgley, (a) The South Wales Railway Company v. Wythes, (b) and The Duke of Beaufort v. Neeld. (c)

The Lord Chancellor reserved his judgment.

March 22.

THE LORD CHANCELLOR. — The defendant the Marchioness of Ely purchased, in the year 1855, the freehold house which
* 640 is the subject * of this suit, under very special conditions of sale, which made it impossible for her to sell again with safety, unless she sold subject to the same or similar stipulations.

Accordingly when, in the month of November, 1863, the defendant became desirous of selling the house, her solicitor Mr. Lethbridge advised her, that as she had purchased subject to special conditions, any contract for the sale of the property into which she might enter ought to be prepared by himself as her professional adviser. Mr. Lethbridge states in his affidavit that having acted professionally for the defendant when she purchased the property, he was well aware that she had purchased under special stipulations, and that a similar contract would be necessary to protect her from difficulty and expense. The defendant states in her answer to the same effect; namely, that in the month of November, 1863, being desirous of selling the house and stabling, she instructed her solicitors Messrs. Lethbridge & Mackrell to sell the same for 10,000*l.*, subject to the stipulations and conditions under which she had purchased the same.

Mr. Lethbridge therefore received, under his own advice, this special and limited authority, and it is clear that he was not authorized, and that he never could have intended, to enter into any contract of which the special stipulations and conditions did not constitute a part.

Acting under this authority, Mr. Lethbridge, on the 7th November, 1863, wrote and sent a letter to Mr. Edwin Smith, a house agent, which was in these words: —

* 641

* “ 25 Abingdon Street, London, S. W.
“ 7th November, 1863.

“ 9 Prince’s Gate.

“ Dear Sir, — We have received instructions from the Mar-

(a) 5 De G., M. & G. 41.

(c) 12 Cl. & Fin. 248.

(b) 5 De G., M. & G. 880.

[490]

chioness of Ely to employ you in selling her house by private contract, provided such sale is effected on or before the 1st day of March next. The price to be 10,000*l.* Possession to be given on the 1st of April, 1864, when the purchase is to be completed, and your fee for selling to be 100*l.*, and this sum to include all expenses. Lady Ely is possessed of the freehold of these premises. Her ladyship will have no objection to let this house furnished to a respectable tenant at a reasonable rent from the 23d instant to the 1st of March next.

“ We are, dear Sir, yours truly,

“ LETHBRIDGE & MACKRELL.”

On the same day Mr. Lethbridge had a personal interview with Mr. Edwin Smith, and then expressly told him that he (Mr. Smith) was not to enter into any contract for the sale of the house and premises, for that he (Mr. Lethbridge) could only advise the defendant to sell subject to conditions similar to those under which she had purchased the property. This is Mr. Lethbridge's evidence, and it is confirmed by Mr. Smith, whose affidavit is in these words:—“ Shortly after the receipt of this letter ” (he is speaking of that of the 7th November, 1863), “ I had an interview with Mr. Lethbridge, who expressly told me I was not to sign any thing, for that any contract for the sale of the property would have to be prepared by Messrs. Lethbridge & Mackrell.”

From these statements two things are plain,—First, that Mr. Smith had no authority to make any final agreement. His office was to exhibit the terms on which * the defendant * 642 proposed to sell, to receive any offers or proposals, and to transmit them to the solicitor and agent of the defendant. Secondly, it is plain that Mr. Lethbridge was anxious from the beginning to keep within the limits of his authority, and to take care that the defendant should not be bound by any agreement which did not include the special stipulations which were necessary for her security.

The letter of Messrs. Lethbridge & Mackrell of the 7th November was read by Mr. Smith to Mr. Galsworthy, the partner of the plaintiff; and on the 11th November, 1863, Mr. Smith having called at the office of Messrs. Chinnock & Galsworthy, the plaintiff offered to purchase, and wrote and handed to Mr. Smith the following letter:—

“ 11 Waterloo Place, Pall Mall, S. W.

“ London, November 11th, 1863.

“ No. 9 Prince's Gate.

“ Dear Sir, — I agree to give you the price which you are authorized to accept for this freehold house and stabling in Ennismore Mews, viz., ten thousand (10,000*l.*) pounds, to include the usual tenants' fixtures; possession as early in March as can be arranged. I shall be obliged if you would forward me the usual contract.

“ I am, dear Sir, yours faithfully,

“ FREDK. CHINNOCK.”

At the same time the plaintiff asked Mr. Smith to give him an acceptance in writing of “ this offer,” a fact which clearly shows that the plaintiff regarded his letter as an offer or proposal only.

On this Mr. Smith's affidavit is in these words: —

“ This I declined to do, and alleged as a reason for my
* 648 refusal that I was expressly prohibited from entering * into any contract, and that a contract for the sale of the property would have to be prepared by Messrs. Lethbridge & Mackrell.”

Pausing here, it is impossible to accede to the argument that was urged before me, that by these communications a contract was made, and that these two letters of the 7th November and 11th November amount to a sufficient memorandum in writing of the terms of that contract.

I do not rely upon the circumstance that the plaintiff's letter of the 11th November is not a simple acceptance of the terms expressed in the letter of the 7th November (although that observation is well founded); but on the fact that the plaintiff was distinctly told by Mr. Smith that he had no authority to make a binding agreement.

An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial. Here it is clear that the defendant was not to be bound by any thing that might pass between Mr. Smith and a third party. Mr. Smith was not entrusted with the letter of the 7th of November for the pur-

pose of making an offer, an acceptance of which he was at liberty to receive, so as to constitute a binding contract, and this peculiar position of Mr. Smith was well known to and understood by the plaintiff.

I must further observe, that if the words "sale" or "the sale" are taken as involving the idea of a binding contract, then there was not at this time any sale by the defendant to the plaintiff.

At this stage of the proceedings the defendant repented * her intention to sell; but, according to the evidence of * 644 Mr. Lethbridge, she was willing that the treaty for the sale should be proceeded with, if Mr. Lethbridge was of opinion that matters had gone so far that she could not honourably recede; but before taking any further step she requested Mr. Lethbridge to call upon the plaintiff and ascertain from him whether he would give up his intended purchase.

A personal interview took place between Mr. Lethbridge and the plaintiff, but as the communications were merely verbal, it is not material to state them. They can have no effect upon the question of the existence, at that time, of a concluded binding agreement. But the fact of the interview is material as it tends to explain the meaning of some words in the subsequent letter.

Mr. Lethbridge, having failed in his object, wrote and sent a letter dated the 19th November, 1863, and which was in these words:—

“ 25 Abingdon Street, London, S. W.

“ November 19th, 1863.

“ No. 9 Prince's Gate.

“ Dear Sir, — We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days.

• “ Yours truly,

“ F. Chinnock, Esq.

LETHBRIDGE & MACKBELL.”

It is on this letter that the plaintiff's counsel chiefly rely. They insist, that the words "we are instructed to proceed with the sale to you" are a clear recognition of the fact that there had been a complete sale to the plaintiff, and, at all events, amount to a distinct acceptance * of the terms stated by the plaintiff * 645 in his letter of the 11th November.

This part of the case requires the most serious attention.

It is clear, in the first place, that if at the time of writing this letter there was no sale, in the sense of concluded contract, between the plaintiff and defendant, then the words "to proceed with the sale," fairly interpreted, must mean to go on with matters as they then stood; and if they were then in treaty only, the words will mean to go on with that treaty. My judgment is that the words mean merely "we are instructed to go on," and that they were written with reference to the fact that the former proceedings had been interrupted by a temporary change of purpose on the part of the defendant. But whether the words are taken in the one sense or the other, they cannot be severed from the rest of the letter, which describes the manner in which the sale was to be proceeded with; namely, by the preparation of a draft contract, which should be forwarded to the plaintiff for approval. Putting, therefore, the plaintiff's own interpretation on the first sentence of the letter, but adding to it that which follows, the fair and just meaning and effect of the whole letter will be, "We will accept your terms of purchase if you agree to the draft contract we are about to send to you." So construed, the approval of the draft contract is a term of the defendant's assent.

I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle v. Freeman*, (a) *Kennedy v. Lee*, (b) and * *Thomas v. Der- ing*, (c) which establish, that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract.

But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a

(a) 9 Ves. 351.

(b) 3 Mer. 441.

(c) 1 Keen, 729.

term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me, for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th November may be expressed in these words: "I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into."

I take, therefore, the letter of the 19th November either as a conditional acceptance of the plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement.

So much for the construction of the letters on which the plaintiff relies as evidence of a final agreement; but * the * 647 case must now be looked at with reference to the authority of the agent by whom the letter of the 19th November was written, and my conclusion is, that if that letter has the construction and effect contended for by the plaintiff, it is not binding on the defendant.

This conclusion I feel obliged to come to, when regard is had to the nature of Mr. Lethbridge's authority and instructions from the beginning.

The letter of the 19th November is signed not by the defendant, but by Mr. Lethbridge in the name of his firm. To bind the defendant it must be shown that Mr. Lethbridge was lawfully authorized so to do. But it is clear, from the facts already stated, that Mr. Lethbridge had no authority to enter, and never meant to enter, into any agreement binding on the defendant which did not secure to the defendant, as vendor, the benefit of conditions and stipulations similar to those under which she purchased. If, therefore, the letter of the 19th November be taken in either of the two senses which I have treated it as capable of bearing, it is consistent with Mr. Lethbridge's authority, and with the course of conduct which, as the defendant's adviser, he had prescribed to himself; but if it be construed in the manner for which the plaintiff contends, viz., as a recognition of the fact of a binding sale, or as an acceptance of the terms stated in the plaintiff's letter of the 11th November, then it is clear that Mr. Lethbridge had no authority to bind the defendant by any such contract.

This short view of the case is, in my judgment, conclusive, and

it was not met by any satisfactory argument on the part of the plaintiff. In truth, it hardly admits of answer; for there can be no dispute or uncertainty as to the limited nature of Mr. Lethbridge's authority.

* 648 * A short-hand writer's note of the Vice-Chancellor's judgment in this case has been handed to me, but it must be very incorrect. At any rate I have great difficulty in finding from it in what manner his Honor dealt with this part of the case, namely, the limited authority. The note seems to attribute to his Honor the opinion that, inasmuch as Mr. Smith had told the plaintiff the contract would be prepared by the defendant's solicitors, and Mr. Lethbridge had not in his personal interview with the plaintiff, or at any time, stated any thing with respect to special conditions, but had in his letter of the 19th November promised to send a draft contract (which his Honor is made to appear to have thought the plaintiff had a right to expect would be the usual contract), it was not competent to the defendant afterwards to insist on the contract containing these special stipulations, and his Honor is made to observe, that the effect of this would be to put the plaintiff completely in the power of the defendant. I regret extremely that I have no better account of his Honor's judgment, for I cannot follow this reasoning or understand how it affects the question of Mr. Lethbridge's authority, or how the circumstances stated to have been referred to by the Vice-Chancellor can debar the defendant from insisting on the limited authority of her agent.

The case is, in my judgment, so clear upon both points, namely, the construction of the letters and the question of authority, that, but for the fact of the Vice-Chancellor having arrived at a different conclusion, I should not have thought it a case of any difficulty.

It is my duty to act upon my own opinion, and I must therefore reverse the decree of the Vice-Chancellor, and order the plaintiff's bill to be dismissed, with costs.

* MAKEPEACE v. ROGERS.

* 649

1865. March 25. Before the LORDS JUSTICES.

A land-owner may maintain a suit in equity against the agent and manager of his estates, if the object of such suit is either to obtain an account (and in that case allegations of fraud or special circumstances are unnecessary) or to obtain the delivery up by the agent of documents in his hands belonging to the land-owner.¹

Observations on *Phillips v. Phillips*, 9 Hare, 471.

THIS was an appeal by the defendant Robert Rogers from a decision of the Vice-Chancellor Sir JOHN STUART, overruling with costs the appellant's demurrer to the bill for want of equity.

The case made by the bill was in effect as follows:—

The respondent John Makepeace, the plaintiff in the suit, was a land-owner and funded proprietor.

The bill in its 2d paragraph alleged, that in 1859 the respondent had appointed the appellant to be the agent and manager of the respondent's real estates at Bracknell, in Berkshire, and at Bromley, in Kent, and of certain houses in London belonging to the respondent, with authority to receive the respondent's rents of the said estates and houses; and that the respondent had given the appellant a power of attorney to receive the dividends and interest of certain bank-stock and other stocks, funds, shares, and securities belonging to the respondent; that the appellant had acted as such agent and manager of the respondent's aforesaid estates and houses, and from time to time received the rents thereof, and from time to time received the dividends and interest of certain bank-stock and other stocks, funds, shares, and securities, or of such of the said estates, houses, and other property aforesaid as from time to time remained unsold, down to the determination of the appellant's employment by the respondent at the end of 1863.

* The bill then charging in effect that the appellant had * 650 had almost uncontrolled authority in the management of the respondent's estates, houses, and other property aforesaid, and

¹ See *Smith v. Leveaux*, 2 De G., J. & S. 1, and cases in note (1); *Adams Eq.* (5th Am. ed.) 220 and note (1), 222, note (1), 226, note (1); 1 *Story Eq. Jur.* § 442 *a*, *et seq.*; 1 *Dan. Ch. Pr.* (4th Am. ed.) 551, and cases cited in note (3); *Duncan v. Lyon*, 3 *John. Ch.* 351, 361.

had by his directions sold certain timber on the estates and also divers parts of the estates, houses, and other property themselves, and received the proceeds of sale, but had rendered none but meagre and unsatisfactory accounts of his receipts generally, and refused or omitted to give any better accounts or any vouchers for his expenditure, and alleging (in its 16th paragraph) that the appellant had in his possession or custody or under his control divers deeds, probates of wills, books, maps, plans, and other documents and muniments of title belonging to the respondent which he ought to deliver up to the respondent, prayed (1) an account of the appellant's receipts for or on account or on behalf of the respondent, or which might have been received by the appellant but for his wilful default or neglect; (2) an account of the appellant's payments to the respondent or to his use or on his behalf; (3) payment of the balance to be found due; (4) delivery by the appellant to the respondent of all deeds, probates of wills, books, maps, plans, muniments of title, papers, and documents belonging to the respondent or relating to his estate; (5) payment by the appellant of the costs of the suit; and (6) general relief.

Mr. Malins and *Mr. Boyle*, for the appellant, contended that the respondent had mistaken his remedy, if he had any, and that an attempt to seek it in equity raised a case of first impression. The relation between the parties was not that of trustee and *cestui que trust*, whence alone the interference of this Court in cases of account was originally derived, but that of principal and agent; and no misrepresentation or fraud on the part of the appel-

* 651 lant was charged. The case, therefore, was * one for a Court of Law, and not for a Court of Equity. There was no mutuality, or even (what indeed would not have alone sufficed to give jurisdiction to this Court had it in fact existed) complication of account between the parties; while the fact that entries had been made on both sides of the account went no further in the direction of conferring jurisdiction upon this Court. As to the charge as to the possession and prayer for the delivery up of muniments of title, it was not necessary to come into equity for relief in that respect, as a simple summons under the Common Law Procedure Act, 1854, § 50, or an action according to the nature of the relief required, would have given ample relief at law.

They referred to and commented upon *Phillips v. Phillips*, (a) *Dinwiddie v. Bailey*, (b) *Padwick v. Stanley*, (c) *Padwick v. Hurst*, (d) *Shepard v. Brown*, (e) *Hemings v. Pugh*, (g) *Flockton v. Peake*, (h) *Foley v. Hill*, (i) *Smith v. Leveaux*, (k) *Topham v. Braddick*, (l) *King v. Rossett*, (m) *Lord Hardwicke v. Vernon*, (n) *Earl of Salisbury v. Cecil*, (o) *Lord Chedworth v. Edwards*, (p) *Lady Ormond v. Hutchinson*, (q) *Navulshaw v. Brownrigg*, (r) *Wilson v. Short*, (s) *Fluker v. Taylor*, (t) *Barry v. Stevens*, (u) *Massey v. Banner*, (v) *Kennington v. Houghton*, (x) *Lockwood v. Abdy*, (y) * *Stephens v. Badcock*, (z) *Henderson v. Eason*, (aa) *Gorely v. Gorely*, (bb) *Hoare v. Contencin*, (cc) *Pearse v. Green*, (dd) *O'Connor v. Spaight*, (ee) *North Eastern Railway Company v. Martin*, (gg) *Taff Vale Railway Company v. Nixon*, (hh) *Croskey v. European and American Steam Shipping Company*, (ii) *Frietas v. Dos Santos*, (kk) *Middleditch v. Sharland*, (ll) *Beaumont v. Boulton*, (mm) *Jenkins v. Gould*, (nn) *Crosskill v. Bower*, (oo) *Mosse v. Salt*, (pp) *Co. Litt.*, (qq) 2 *Inst.*, (rr) *Fitz. Nat. Brev.*, (ss) *Year Book*, 2 Hen. 4.

Mr. Osborne and *Mr. Fitzroy Kelly*, for the respondent, were not called upon.

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| (a) 9 Hare, 471. | (k) 2 De G., J. & S. 1. |
| (b) 6 Ves. 136, 141. | (l) 1 Taunt. 572. |
| (c) 9 Hare, 627. | (m) 2 Y. & J. 33. |
| (d) 18 Beav. 575. | (n) 4 Ves. 411. |
| (e) 4 Giff. 208. | (o) 1 Cox, 277. |
| (g) 4 Giff. 456. | (p) 8 Ves. 46. |
| (h) 12 W. R. 562. | (q) 16 Ves. 94. |
| (i) 1 Ph. 399; 2 H. L. Cas. 28. | |
| (r) 1 Sim. (N. S.) 573; 2 De G., M. & G. 441. | |
| (s) 6 Hare, 366. | (gg) 2 Ph. 758. |
| (t) 3 Drew. 183. | (hh) 1 H. L. Cas. 111. |
| (u) 31 Beav. 258. | (ii) 1 J. & H. 108. |
| (v) 4 Madd. 413. | (kk) 1 Y. & J. 574. |
| (x) 2 Y. & C. C. C. 620. | (ll) 5 Ves. 87. |
| (y) 14 Sim. 437. | (mm) 7 Ves. 599. |
| (z) 3 B. & Ad. 354. | (nn) 3 Russ. 385. |
| (aa) 17 Q. B. 701. | (oo) 32 Beav. 86. |
| (bb) 1 H. & N. 144. | (pp) 32 Beav. 269. |
| (cc) 1 Bro. C. C. 27. | (qq) Page 90 b, n. 5; 172 a. |
| (dd) 1 J. & W. 135. | (rr) Page 389. |
| (ee) 1 Sch. & Lef. 305. | (ss) Page 119. |

The Lord Justice KNIGHT BRUCE said that this was one of the clearest cases that had ever come under his Lordship's notice, and that he was surprised at the demurrer, and surprised at the appeal. The bill was filed by a land-owner against a person whom he had for some years employed as the agent and manager of his estates, and the allegations of its 2d paragraph were these: [His Lordship read the passage in question and proceeded.] Had there been nothing else in the case than this the plaintiff would have been entitled to a decree. His Lordship did not think that the Lord Justice, when as Vice-Chancellor he had disposed of *Phillips v. Phillips*, (a) had intended to say that a bill in equity for an account would not lie unless there had been receipts and

* 653 * payments on both sides.¹ The existence of a fiduciary relation between the parties, as, for example (as was the case here), that of principal and agent, was sufficient to confer jurisdiction on this Court, and allegations of fraud or special circumstances were unnecessary. No doubt if there had been between the parties a stated and settled account, or an executed release, it might be necessary for the plaintiff to show a special case to induce this Court to grant the relief sought. But no such case arose here. Beyond which, the claim set up by the present plaintiff against the defendant his steward in the 16th paragraph of the bill, and in respect of which relief was sought by the 4th paragraph of the prayer, extending, as that claim did, not to discovery only, but to delivery up to the plaintiff of the muniments in question, was alone sufficient to entitle him to relief in this Court. The demurrer and the appeal were alike to be reprobated.

The Lord Justice TURNER said that this was clearly not a case in which their Lordships could, in justice to the Vice-Chancellor, to themselves, or to the principles of the Court, call upon the counsel for the plaintiff. The claim and prayer in the bill as to the documents were alone sufficient to support it, any provisions of the Common Law Procedure Act, 1854, or legal rights enforceable by action notwithstanding. But it was not necessary to decide the case upon these grounds, for upon the demand for an account it was equally clear. Although it might be that in a simple case

(a) 9 Hare, 471.

¹ See *Porter v. Spencer*, 2 John. Ch. 171; 1 Story Eq. Jur. § 458; *Adams Eq.* (5th Am. ed.) 222, note (1).

a more convenient course would be to apply for relief to a Court of Common Law, still, as between principal and agent, there existed that fiduciary relation which gave jurisdiction to this Court to interfere on behalf of the principal suing his agent as such; and the existence of fraud was not, although the contrary had been contended * at the bar, a necessary element to give * 654 jurisdiction to this Court to interfere in such a case. *Mac-kenzie v. Johnston* (a) was in point to the contrary. *Phillips v. Phillips*, (b) in which his Lordship had commented on that case, went upon the footing of the account there in question being a current account between the parties; and the bill made no case of general agency, alleging only an isolated agency transaction connected with the sale by the defendant of some railway shares belonging to the plaintiff. That case had no reference to a case of general account between principal and agent; and if his Lordship's language in giving judgment in that case had been in fact such as to give rise to misapprehension, such misapprehension ought to have been dispelled by what he had said in the subsequent case of *Padwick v. Stanley*, (c) when adverting to the want of correlation between the rights of a principal and an agent to sue in this Court. In the present case the Vice-Chancellor's conclusion was perfectly correct, and the appeal must be dismissed, with costs.

* *Ex parte* THOMAS CHAVASSE, ISAAC JENKS, and * 655
WILLIAM GEORGE DIXON.

In the Matter of WILLIAM JOSEPH GRAZEBROOK, a Bank-
rupt.

1865. January 18. April 22. Before the Lord Chancellor Lord WESTBURY.

A joint adventure between the subjects of a neutral power for running a blockade established by one of two foreign belligerents against the ports of the other with a cargo of arms and ammunition is not an unlawful contract, but one from which the ordinary rights of property result.

International law subjects a neutral merchant who transports contraband of war to the risk of having his ship and cargo captured and condemned by the

(a) 4 Madd. 373.

(b) 9 Hare, 474.

(c) 9 Hare, 628.

belligerent power for whose enemy the contraband is destined; but the commerce which was lawful for the neutral with either belligerent country before the war is not made by the war unlawful or capable of being prohibited by both or either of the belligerents.¹

If a British ship-builder builds a vessel of war in an English port and arms and equips her for war *bonâ fide* on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding, or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act (59 Geo. 3, c. 69).

The object of a proclamation is to make known the existing law, and it can neither make nor unmake law.

THIS was an appeal by Thomas Chavasse, Isaac Jenks, and William George Dixon, who were the trustees of a deed for the benefit of creditors executed by Horace Chavasse, and registered under the Bankruptcy Act, 1861, § 192, from the dismissal with costs by Mr. Commissioner PERRY of a petition presented by them in the bankruptcy of William Joseph Grazebrook.

The object of the petition was to obtain an apportionment as between the appellants and the bankrupt's estate of part of the proceeds of a joint venture on the part of the bankrupt and Horace Chavasse for running the blockade instituted by the Northern against the ports of the Confederate States of America during the late war with a cargo of arms and ammunition.

* 656 The part of the proceeds in question was represented * by a quantity of cotton, in which part of the immediate produce of the venture had been invested.

The learned commissioner held that the joint venture between Horace Chavasse and the bankrupt was illegal, and was impeachable because the dealings under it were illegal or prohibited, and on this ground, as has been stated, dismissed the petition, with costs.

The present appeal was from that decision.

Mr. Daniel, Mr. De Gex, and Mr. Thomas Jones appeared for the appellants; and

Mr. Aspinall and Mr. Charles Russell, for the respondents, the assignees of the bankrupt's estate.

¹ See *Hobbs v. Henning*, 17 C. B. N. S. 791, 810; *The Helen* L. R. 1 Ad. & Ecc. 1.

The judgment of the Lord Chancellor followed in great measure the line of argument on the part of the appellants, and sufficiently shows the scope of that on the part of the respondents.

The authorities referred to were the following : —

The Santissima Trinidad, (a) *The Attorney-General v. Sillem*, (b) *Holman v. Johnson*, (c) *The Nancy*, (d) *The Imina*, (e) *The Rosalie and Betty*, (g) *The Betsey*, (h) *Bird v. Appleton*, (i) *Harratt v. Wise*, (k) *Naylor v. Taylor*, (l) *Medeiros v. Hill*, (m) *The Neptunus*, (n) *The Shepherdess*, (o) *The Tutela*, (p) *Armstrong * v. Armstrong*, (q) *De Metton v. De Mello*, (r) * 657 *Richardson v. The Maine Fire and Marine Insurance Company*, (s) *Sharp v. Taylor*, (t) *Ralli v. The Universal Marine Insurance Company*, (u) *Curtis v. Perry*, (v) *Brackenbury v. Brackenbury*, (x) *Keir v. Leeman*, (y) *Shiffner v. Gordon*, (z) Stats. 59 Geo. 3, c. 69 (The Foreign Enlistment Act), and 16 & 17 Vict. c. 107, § 150 ; The Queen's Proclamation of 13th May, 1861, (aa)

(a) 7 Wheaton, 283, 340.

(b) 2 H. & C. 431, 504, 505, 523.

(c) Cowp. 341.

(d) 3 Rob. 122.

(e) 3 Rob. 167.

(l) 9 B. & C. 718 ; and see *The Helen*, L. R. 1 Adm. & Ecc. 1 ; *Burton v. Pinkerton*, L. R. 2 Exch. 340.

(m) 8 Bing. 231.

(n) 2 Rob. 110.

(o) 5 Rob. 262.

(p) 6 Rob. 177.

(u) 2 J. & H. 159, 175 ; 4 De G., F. & J. 1.

(v) 6 Ves. 789.

(x) 2 J. & W. 391.

(g) 6 Rob. 386 (n).

(h) 1 Rob. 93.

(i) 8 T. R. 562.

(k) 9 B. & C. 712.

(q) 3 M. & K. 45.

(r) 12 East, 234.

(s) 6 Massachusetts Rep. 102.

(t) 2 Ph. 801.

(y) 6 Q. B. 308 ; 9 Q. B. 371.

(z) 12 East, 296.

(aa) The material portions of this proclamation are as follows. It recited amongst other things the Foreign Enlistment Act, and proceeded as follows : " Now, in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said statute, we do hereby strictly command that no person or persons whatsoever do commit any act, matter, or thing whatsoever contrary to the provisions of the said statute upon pain of the several penalties by the said statute imposed and of our high displeasure : and we do hereby further warn all our loving subjects and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our royal proclamation and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral sovereign in the said contest, or in violation or contravention of the law of nations in that behalf ; as for example and more especially . . . by fitting out, arming, or equipping any ship or vessel to be

* 658 * Kent's Commentaries, (a) Wheaton's International Law, (b) Arnould on Marine Insurance, (c) Duer on Marine Insurance, (d) Bacon's Abr. "Prerogative," B., (e) Chitty on Prerogative, (g) Stephen's Commentaries. (h)

Mr. Daniel, in reply, referred to the correspondence between Mr. Jefferson and Mr. Hammond. (i)

At the conclusion of the argument the Lord Chancellor reserved his judgment.

April 22.

THE LORD CHANCELLOR. — In the view of international law the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations and they become belligerents, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects.

The belligerent power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture when found on the sea, the high road of nations, any munitions of war which are destined, and in the act of being transported in a neutral ship, to its enemy.

This right which the laws of war give to a belligerent for his

employed as a ship of war or privateer or transport by either of the said contending parties, or by breaking or endeavouring to break any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, despatches, arms, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties; all persons so offending will incur and be liable to the several penalties and penal consequences by the said statute or by the law of nations in that behalf imposed or denounced: and we do hereby declare, that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their peril and of their own wrong, and that they will in nowise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such misconduct."

(a) Vol. 1, p. 145.

(b) Page 813.

(c) Page 762, 2d ed.

(d) Vol. 1, pp. 623, 748, 750.

(e) Page 405.

(g) Page 172.

(h) Vol. 4, chap. 8.

(i) See 2 H. & C. 478 *sqq.*, note.

protection does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject.

In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. These conflicting rights are coexistent, and the right of the one party does not render the act of the other party wrongful or illegal.

There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize *in transitu* munitions of war whilst being conveyed by a neutral to his enemy, speak of the act of transport by the neutral as unlawful and prohibited commerce.

But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents, and all that *international law * 660 does is to subject the neutral merchant, who transports the contraband of war, to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequence beyond the judicial condemnation of the ship and cargo, nor can he make it the subject of complaint.

This is well explained by Vattel in the following passage:—

Speaking as a belligerent power, and in respect of its relations with neutral nations, he says:—

“ Quand je leur ai notifié ma déclaration de guerre à tel ou tel peuple, si elles veulent s'exposer à lui porter des choses qui servent à la guerre, elles n'auront pas sujet de se plaindre au cas que leurs

marchandises tombent dans mes mains ; de même que je ne leur déclare pas la guerre, pour avoir tenté de les porter. Elles souffrent, il est vrai, d'une guerre, à laquelle elles n'ont point de part ; mais c'est par accident. Je ne m'oppose point à leur droit, j'use seulement du mien ; et si nos droits se croisent et se nuisent réciproquement, c'est par l'effet d'une nécessité inévitable. Ce conflit arrive tous les jours dans la guerre." (a)

Vattel must here be considered as speaking of the acts of the subjects of a neutral power, and not of the neutral government itself, for the supplying of warlike stores to a belligerent by a neutral state would clearly be a breach of neutrality.

The same doctrine as to the freedom of the commerce of a neutral subject is more explicitly stated by Mr. Chancellor * 661 KENT in his Commentaries, (b) and was most * distinctly affirmed in a celebrated decision of the Supreme Court of the United States. (c)

The language of Chancellor KENT is clear and comprehensive : —

"It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport and of the hostile power to seize are conflicting rights, and neither party can charge the other with a criminal act."

The material passage of the judgment of the Supreme Court in the case to which I have referred is the following : —

"There is nothing in our laws, or in the law of nations, that

(a) *Le Droit des Gens*, Liv. 3, c. 7, § 111.

(b) 1 *Kent's Comm.* 142.

(c) *The Santissima Trinidad*, 7 *Wheaton*, 340.

forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation."

I take this passage to be a very correct representation of the present state of the law of England also.

* For if a British ship-builder builds a vessel of war in an English port, and arms and equips her for war *bonâ fide* on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding, or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act. (a) * 662

It is true that under the provisions of the Act of the 16 & 17 Vict. c. 107, her Majesty has power by proclamation or order in council to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores, but no order in council or proclamation was made in the terms or under the special authority of this statute.

Great reliance, however, was placed by the counsel for the respondents on the Queen's proclamation of the 13th May, 1861, although it was admitted that it could not be treated as made under the authority of the last-mentioned statute.

I need not observe that it is the object of a proclamation to make known the existing law, and that it can neither make nor unmake law. But, in truth, the proclamation of 1861 is directed, and very properly, to two objects: first, to declare that the provisions of the Foreign Enlistment Act would be strictly enforced; and secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations, and would * receive no protection or relief from these consequences (that is, from capture and condemnation) at the hands of her Majesty. * 663

The proclamation has no effect whatever on the legality of this adventure.

In my judgment, therefore, this adventure between the bankrupt

(a) Stat. 59 Geo. 3, c. 69.

and Mr. Chavasse, whose estate is represented by the present petitioners, was a lawful contract, and the ordinary rights of property result from it.

It follows that the goods in which the proceeds of the adventure were invested belong to the petitioners and the bankrupt's estate according to their several interests in that adventure and their contributions to the same; and the commissioner's order must be reversed and the case remitted to him with a declaration that there was a valid partnership between the bankrupt and Mr. Chavasse in the adventure described in the petition, and that the accounts of the partnership ought to be taken, the partnership property sold or otherwise disposed of, and the proceeds applied in payment of the debts of the partnership, and the surplus divided according to the interests of Mr. Chavasse and the bankrupt respectively.

* 664

* *Ex parte* BENJAMIN MAYOU.

In the Matter of WILLIAM EDWARDS-WOOD and JAMES YATES GREENWOOD, Bankrupts.

1865. March 15, 18. April 22. Before the Lord Chancellor Lord WESTBURY.

A partnership of two was dissolved, the outgoing partner assigning to the continuing partner all his share in the partnership assets, and the latter covenanting to pay the partnership debts. At the date of the assignment the firm was insolvent, as was also each of the partners. The firm being shortly afterwards adjudged bankrupt: *Held*, that the transaction was void; that it did not operate as a conversion of the outgoing partner's property into the separate estate of the continuing partner; and that the whole of the property as it existed belonging to the bankrupts at the date of the assignment must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors.¹

THIS was an appeal by Benjamin Mayou from the dismissal by Mr. Commissioner SANDERS of a petition presented on behalf of

¹ See *Howe v. Lawrence*, 9 Cush. 553; *Harmon v. Clark*, 13 Gray, 114; *Menagh v. Whitwell*, 52 N. Y. 146, 159, 160, 167, 171; *Robb v. Mudge*, 14 Gray, 534, 537; *Allen v. Center Valley Co.*, 21 Conn. 130, 137; *Ferson v. Monroe*, 21 N. H. 462, 469; *Baker's Appeal*, 21 Penn. St. 76; *Dimon v. Hazard*, 32 N. Y. 65; 1 *Lindley Partn.* (3d Eng. ed.) 676-678; 2 *ib.* 1206, 1207; *Ex parte Walker*, 4 De G., F. & J. 508, and cases in note (1).

himself and all other the joint creditors of the bankrupts in the bankruptcy of William Edwards-Wood and James Yates Greenwood by the appellant.

The bankrupts were partners. Their business was that of brick-makers, and they also held certain leases of a colliery that was expected to be a profitable work.

In the month of August, 1863, the bankrupts were in great difficulties and embarrassment.

In the month of November, 1863, a trader debtor summons was taken out against them for a debt of 250*l.*, and in the same month several writs for large sums of money were issued against them.

On the 9th of December, 1863, they went together to a gentleman of the name of Goode, for the purpose of * induc- * 665 ing him either to renew certain bills which he had accepted for the accommodation of the bankrupts, or to make a further advance of money. Mr. Goode declined to comply with that application, whereupon the bankrupts determined to dissolve their partnership, and a deed was prepared and executed on that day, whereby James Yates Greenwood assigned to William Edwards-Wood, who was therein stated to have the intention of continuing the business on his own account, all the share and interest of James Yates Greenwood in the mines and veins and beds of coal and other the property comprised in the leases, and also in the stock, plant, machinery, engines, credits, and effects belonging, due, and owing to the bankrupts as partners, and whereby William Edwards-Wood covenanted with James Yates Greenwood within three years from the date of the deed to pay all and every the debts due and owing from or by the bankrupts in respect of the partnership, and to pay the rents and royalties and perform all the covenants in the leases, and indemnify James Yates Greenwood therefrom and from all actions instituted by virtue of a power of attorney contained in the deed of dissolution.

On an examination of the evidence the Lord Chancellor (from whose judgment the present statement of the facts of the case is in substance taken) was satisfied that at the time of the execution of this deed the partnership was insolvent, and each of the partners was insolvent. There might have been some expectation on the part of William Edwards-Wood that, if he succeeded in obtaining advances, the colliery might be profitably worked. In the event that did not turn out to be the case.

On the 24th of December, 1863, a petition for adjudication
 * 666 of bankruptcy against the bankrupts was filed * in the Birmingham Court of Bankruptcy, under which they were adjudicated bankrupts.

An earlier petition filed on the 15th of the same month, with the same object, had been allowed to drop.

By the appellant's petition he sought a declaration that the dissolution deed of the 9th of December, 1863, was fraudulent and void as against the joint creditors of the bankrupts; and that, notwithstanding that deed, the assets of the firm remained joint assets to be administered as such in bankruptcy; or, in the alternative, liberty to the appellant to prove his debt in the bankruptcy against the separate estate of William Edwards-Wood.

The learned commissioner upon hearing this petition dismissed it, and the present appeal was from that order.

Mr. Bacon and *Mr. De Gex*, for the appellant. — The effect of the dissolution deed of the 9th of December, 1863, must have been to defeat and delay the joint creditors of the firm by turning the joint estate into the separate estate of Edwards-Wood, and as the parties must be assumed to have intended that which was the natural result of their acts, the execution of that deed was an act of bankruptcy. It was also a fraudulent preference of the separate creditors of Edwards-Wood over the joint creditors of the firm. *Ex parte Wensley*, (a) *Ex parte Zwilchenbart*, *In re Marshall*, (b) *Leake v. Young*. (c) The cases of *Rose v. Haycock* (d) and * 667 * *Baxter v. Pritchard* (e) have no application to a case like the present; nor have cases like *Ex parte Ruffin*, (g) *Ex parte Fell*, (h) and *Ex parte Williams*, (i) which were cases of *bonâ fide* conversion of joint assets into separate assets upon a dissolution of partnership not necessarily involving any defeat or delay of the joint creditors, nor raising any question as to the commission of an act of bankruptcy.

Mr. Daniel and *Mr. Fry*, for the separate creditors of William

(a) 1 De G., J. & S. 273.

(b) 3 M., D. & De G. 671; and on appeal, De Gex, 273.

(c) 5 Ell. & Bl. 955.

(g) 6 Ves. 119.

(d) 1 Ad. & Ell. 460.

(h) 10 Ves. 347.

(e) 1 Ad. & Ell. 456.

(i) 11 Ves. 3.

Edwards-Wood. — The dissolution deed was no act of bankruptcy. It is not within the Bankrupt Law Consolidation Act, 1849, § 67, for it was not a fraudulent grant, conveyance, gift, delivery, or transfer, but was only a release or surrender of goods and chattels in which the surrenderee was jointly interested with the surrenderor, and the evidence proves the *bona fides* of the transaction, and that the parties contemplated the business being carried on by Mr. Edwards-Wood alone, with better prospects than would have attended a continuance of the partnership, and that they acted without any intention of defeating any creditor or of preferring one creditor to another, but had simply in view a dissolution, with merely the usual provisions incidental to a dissolution. Nor is the deed void under the Statute 13 Eliz. c. 5, as a voluntary assignment, or as having the effect or intent of defeating or delaying creditors. *Dutton v. Morrison*. (a) Each of the parties to the deed was jointly and severally liable to the creditors of the firm, and the partnership assets could not be said in any way to have been withdrawn from administration in bankruptcy.

* They also referred to *Ex parte Peake*, (b) *Ex parte Walker*, (c) *Ex parte Snow*. (d) * 668

Mr. Little, for the assignees of the bankrupts' estate, took no part in the argument.

Mr. Bacon, in reply.

Anderson v. Maltby, (e) *Ex parte Rowlandson*, (g) and *Ex parte Fry* (h) were also referred to during the arguments.

THE LORD CHANCELLOR. — Reserving my final decision until a future occasion, I will nevertheless now state my present impression.

Upon the evidence before me I think it clear that upon the 9th of December, 1863, when the assignment which is now impeached was executed by them, both of these gentlemen were insolvent as

(a) 17 Ves. 193.

(b) 1 Madd. 346.

(c) 4 De G., F. & J. 509; and see *In re Kemptner*, L. R. 8 Eq. 286.

(d) 1 Cooke, B. L. 587.

(g) 2 V. & B. 172.

(e) 4 Bro. C. C. 423; 2 Ves. Jr. 244.

(h) 1 Gl. & J. 96.

a firm, and they were both also insolvent individually, and being so insolvent they entered into a mutual contract having for its object an attempt to convert their joint property into separate property.

Taking then, in the first place, the principle of law which is embodied in the Statute of 18 Eliz. c. 5, and applying that to the transaction, I think that it was not competent for the one to make or for the other to accept an assignment of that description, both of them being insolvent at the time.

* 669 * Taking, again, the same principle and applying it to the language of the 67th section of the Bankrupt Law Consolidation Act, 1849, I think it clear that this assignment was fraudulent within the meaning of the words of that statute, because it had for its immediate and necessary object and consequence the alteration of the property in such a manner as would defeat or delay the joint creditors. The joint property is taken out of the reach of the joint creditors if effect is given to the assignment.

Thirdly, having regard to the principle that a voluntary assignment is in this sense a fraudulent assignment, if I regard the transaction as entered into by one partner alone, I cannot look at it as a conveyance for good or valuable consideration, seeing that the covenant by the assignee of the partner was a covenant entered into by a man in a state of insolvency, and in this sense, being voluntary, it would be fraudulent within the meaning which has been applied to this term.

My strong impression therefore is, that this transaction, had it been made the subject of judicial decision before the Statute of Bankruptcy which introduced these words, "fraudulent grant or conveyance of any lands, tenements, goods, or chattels with intent to defeat or delay creditors," would not have been denominated a real, that is a *bonâ fide* transaction, and therefore would not have been held valid according to the purport of Lord ELDON's judgments in *Ex parte Ruffin* (a) and *Ex parte Williams*, (b) for I regard his references to *bona fides* as being nothing more than a short expression of that principle, which has been expanded more fully into the form now found in the 67th section of the Act of 1849.

* 670 * The result is, that if upon further consideration I abide by my present impression, this transaction cannot stand.

(a) 6 Ves. 119.

(b) 11 Ves. 3.

It is an unfortunate attempt to make a conversion of property, and the subject-matter of the intended assignment not being converted remains as it was at the date of the bankruptcy.

The extremely inconvenient and disastrous consequences which would follow from holding that it is competent to partners in the situation in which these gentlemen found themselves to effect a conversion of property, with all the consequences to which that conversion might be made to lead, need scarcely be adverted to. I will, however, as I have said, further consider the matter, and mention the case again.

April 22.

The Lord Chancellor, after stating the facts of the case to the effect of the statements thereof herein before contained, proceeded as follows : —

The question which arises under these circumstances is, whether it was competent to Mr. Greenwood to make, and to Mr. Edwards-Wood to receive, an assignment of the partnership property which would have the effect of converting the joint estate into the separate estate of Mr. Edwards-Wood, of withdrawing from the joint creditors that property to which they were entitled, and also of taking from Mr. Greenwood's separate creditors any separate property or interest to which that gentleman might be found to be entitled in that joint property after the joint debts were paid.

Lord ELDON, in *Ex parte Williams*, (a) very concisely * sums up the principles upon which transactions of this * 671 nature must depend as being that of their *bona fides*.

Can, then, an assignment of this nature be made *bonâ fide* by a partner when the partnership is in a state of insolvency, and the partners themselves are equally insolvent in their separate character ?

The principle of law embodied in the Statute 13 Eliz. c. 5, and the principle expressed and declared by the Bankrupt Law Consolidation Act, 1849, § 67, forbid me to hold this assignment to be any thing but a fraudulent conveyance, — fraudulent against creditors, and one which would have the effect of delaying and defeating the just creditors of an insolvent person in their attempts to recover and make available the property of that person.

Applying, therefore, that test to the matter, I hold that there was

(a) 11 Ves. 3.

no *bona fides* in this transaction ; that the assignment was fraudulent ; that it was void ; that it did not operate as a conversion of the property of the bankrupt Mr. Greenwood into the separate estate of the bankrupt Mr. Edwards-Wood ; that the whole of the property as it existed belonging to the bankrupts at the date of the deed of the 9th of December, 1868, must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors.

The order of the learned commissioner must therefore be reversed, and a declaration made to the effect which I have stated.

That is, substantially, to grant the prayer of the petition, and the appellant must have his costs out of the joint estate.

* 672 * HUTTON v. THE SCARBOROUGH CLIFF HOTEL COMPANY, LIMITED.

1865. April 25. Before the Lord Chancellor Lord WESTBURY.

The memorandum of association of a limited company formed under the Joint-stock Companies Acts, 1856, 1857, declared the share capital to be so many shares of so much each. The articles of association contained no power to alter the memorandum in this respect, or to authorize the company by resolution to alter the rights of the original shareholders ; but provided that the directors might, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares : *Held*, that the company could not, by a special resolution under the Companies Act, 1862, authorize the issue of the unallotted portion of the original share capital with a preferential dividend.¹

THIS was an appeal by the defendants, the Scarborough Cliff Hotel Company, Limited, and its directors, from an order of the Vice-Chancellor Sir RICHARD TORIN KINDERSLEY restraining the appellants from acting upon an alleged special resolution under the Companies Act, 1862, purporting to have been passed by the company, and to authorize the issue of parts of the original share capital in the company which remained unallotted with a preferential dividend.

The case in the Court below is reported in the 2d volume of Messrs. Drewry & Smale's Reports. (a)

¹ See 1 Lindley Partn. (3d Eng. ed.) 625, 626.

(a) Page 514.

By the memorandum of association of the company, dated the 23d of June, 1862, it was declared that the liability of the shareholders was limited, and that the nominal capital of the company should be 120,000*l.*, divided into 12,000 shares of 10*l.* each.

The 52d clause of the articles of association of the company, which were of even date with its memorandum of association, provided that the business of the company should be managed by the directors, who might exercise all such powers of the company as were not by the Joint-stock Companies Act, 1856, or the * articles declared to be exercisable by the company in * 673 general meeting, but subject nevertheless to any regulations in the articles and to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as might be prescribed by the company in general meeting; but that no such regulation made by the company in general meeting should invalidate any prior act of the directors which would have been valid if such regulation had not been made.

The 72d clause of the articles provided that the directors might, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares.

The other material contents of the articles appear from the Lord Chancellor's judgment.

The whole of the shares in the company were not taken up, and upon the motion of the appellants the following resolution was on the 6th of February, 1865, passed, and on the 2d of March, 1865, confirmed, at extraordinary general meetings of the shareholders in the company, in manner required to constitute it a special resolution as defined by the Companies Act, 1862:—

“ That as to 5783 and all other now existing shares from time to time remaining unallotted, or any of them, the directors may, if they think fit, and at such time or times as they may deem expedient, issue the same with a preferential dividend not exceeding the rate of 7*l.* per centum per annum, payable from time to time half-yearly out of the net revenue of the company for each separate year, but without recourse to the revenue of any subsequent year; and the directors may pay such preferential dividend accordingly, and also may make calls * in respect of such shares, * 674 in such amounts, at such time or times, and in such manner as they may think fit; and such shares shall be subject to the arti-

cles of association and the regulations of the company, except so far as the same may be inconsistent with this resolution."

The respondents, the plaintiffs in the suit, who were three of the shareholders in the company, had notice of but were not present at the meetings at which this resolution was passed and confirmed respectively.

The appellants proceeded to act upon the resolution so passed and confirmed, and upon the 6th of March, 1865, they issued a printed circular stating, that, in exercise of the powers conferred upon them by the resolution, they had determined that 5717 of the shares therein referred to should be issued with a preferential dividend at the rate of 7*l.* per centum per annum in perpetuity, subject to the terms of the resolution and to the payment on or before the 6th of April then next of 1*l.* 10*s.* on account of each such share issued, and that such shares should be in the first instance offered *pro rata* to the existing shareholders, and by the circular in question such shares were offered to the existing shareholders accordingly.

The respondents thereupon filed the bill in this suit on behalf of themselves and all the other shareholders in the company, except such as were defendants, seeking a declaration that it was beyond the powers of the meetings of the 6th of February and 2d of March, 1865, respectively, to pass and confirm the resolution in question so as to bind the respondents and the other dissentient shareholders, and an injunction to restrain the appellants from acting as they proposed under the resolution.

* 675 * The Vice-Chancellor, upon a motion by the respondents, granted the injunction, and the present appeal was from his Honor's order so made.

The Attorney-General (Sir R. PALMER), *Mr. Glasse*, and *Mr. Bury*, for the appellants, commented upon the Companies Act, 1862, §§ 8, 12, 50, 176, and 205, the provisions of which, so far as they are material, are respectively set out below, (a) and

(a) Sect. 8. "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, herein after referred to as a company limited by shares, the memorandum of association shall contain the following things; (that is to say) —

(1) The name of the proposed company, with the addition of the word 'limited' as the last word in such name:

referred to *Simpson v. * The Westminster Palace Hotel * 676*
Company Limited, (a) Bryon v. The Metropolitan Saloon
Omnibus Company, Limited, (b) Lord v. The Governor and Com-
pany of Copper Miners. (c)

(2) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate :

(3) The objects for which the proposed company is to be established :

(4) A declaration that the liability of the members is limited :

(5) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount :

Subject to the following regulations : —

(1) That no subscriber shall take less than one share :

(2) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes."

Sect. 12. " Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner herein after mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock. . . ."

Sect. 50. " Subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting, from time to time, by passing a special resolution in manner herein after mentioned, alter all or any of the regulations of the company contained in the articles of association, . . . or make new regulations to the exclusion of or in addition to all or any of the regulations of the company ; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution."

Sect. 176. " Subject as herein after mentioned, this Act, with the exception of Table A. in the first schedule, shall apply to companies formed and registered under the said Joint-stock Companies Acts, or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this Act as a company limited by shares, . . . with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint-stock Companies Acts, or any of them, . . ."

Sect. 205. " After the commencement of this Act there shall be repealed the several Acts specified in the first part of the third schedule hereto, . . ."

The first part of the third schedule to this Act contained the Joint-stock Companies Acts, 1856, 1857.

(a) 2 De G., F. & J. 141.

(c) 2 Ph. 740.

(b) 3 De G. & J. 123.

The scope of their arguments appears from the Lord Chancellor's judgment.

Mr. Baily, Sir Hugh Cairns, and Mr. Speed, for the respondents, were not called upon.

THE LORD CHANCELLOR. — No doubt the directors have acted *bonâ fide*, but the mode of action which they have adopted is not justified under the provisions of the Act of Parliament.

* 677 * Their proposal is not, as has been suggested, a matter of mere internal regulation; for if it be carried into effect the result will be that the shareholders, instead of standing upon terms of equality, will be divided into two classes, of which one will have priority over the other. That is not a matter of internal regulation, but an essential alteration of the basis of the company.

Does not, then, the memorandum of association interfere with what is proposed to be done?

The memorandum of association is the foundation and basis of the company; and, according to the Act of Parliament, that memorandum can only be altered in the manner prescribed by the 12th section. The 12th section gives power to alter the memorandum only if there be inserted in the articles of association a provision to that effect. In the regulations appended to the memorandum of association in this case there certainly is contained no power to alter the 5th section of the memorandum of association; and there is nothing in those regulations to give power to the company to alter, by resolution or otherwise, the powers or rights of the holders of the 12,000 shares therein referred to. The memorandum declares that the capital of the company shall be divided into 12,000 shares of 10*l.* each, — a provision which shows that these 12,000 shares are necessarily *inter se* equal and of equal rights and privileges. But what is proposed to be done is to divide these 12,000 shares into two portions, and to place the latter portion in a position of priority to the former. There is nothing in the regulations by which such a state of things is contemplated.

With regard to a special resolution under the 50th section
* 678 of the Act, it is sufficient to say, that if there be * nothing to enable the company to alter the basis contained in its memorandum of association, there can be no acquired power under that section to make the change by an alteration of the articles.

Again, does not what is here proposed to be done interfere with the articles of association of this company?

I think it does. The 72d clause of those articles appears to me to involve of necessity this, that the dividend to be paid to the shareholders, that is, to the persons who hold part or the whole of the 12,000 shares, is to be paid to them in proportion to what they hold. In other words, the holder of each of these 12,000 shares is to receive a numerically equal dividend, the amount being regulated by the proportion of the whole sum of money as compared with the entire number of shareholders, and every one included in this number is to stand on an equality with every other. But if there happen to be 12,000l. to be divided, and 9000l. is to be taken as the dividend of half the shareholders, and 3000l. as the dividend of the other half, there is no equality. What, therefore, is proposed to be done is, in plain language, to strike the 72d clause out of the body of the articles of association, and it is said that the 50th section of the Act enables that to be done.

As the Vice-Chancellor has abstained from determining the question, I will not now say conclusively that this cannot be done, but my present opinion is that it cannot, where the result would be to produce inequality amongst the original shareholders.

I adhere entirely to the order of the Vice-Chancellor, and refuse the appeal motion, with costs.

* SIMPSON v. THE SOUTH STAFFORDSHIRE * 679
WATERWORKS COMPANY.

1865. April 20, 21. May 6. Before the Lord Chancellor Lord WESTBURY.

It is incumbent upon a company claiming a statutory compulsory power of taking land to prove clearly and distinctly from the Act of Parliament the existence of the power; and if there is any doubt with regard to its extent, the land-owner should have the benefit of that doubt.

The effect of the incorporation of a general Act of Parliament into the special Act of any such company is, that the general Act must be looked at with reference to the powers conferred upon companies of dealing with the land when acquired; but it is to the special Act that regard must be had for the purpose of ascertaining the contract between the land-owner and the company and the power which the company has of taking the land.

The meaning of the 12th section of the Waterworks Clauses Act, 1847, is, that subject to a company having authority to take lands and construct works,

then, if the company have power, and space, and room enough in the land which they are authorized to take to afford them an area for additional works, they may be empowered to make the collateral and auxiliary works referred to in the section.

The whole tenor of the Act in question is, that it refers by anticipation to the special Act for the purpose of ascertaining therein what is the land to be taken and what are the works to be done on the land. Referring to that, it then invests the company with certain general powers which may be useful or necessary for the purpose of carrying into effect upon the land authorized to be taken the work which by the special Act is definitively described.

A waterworks company incorporated by a special Act, with which were incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, deposited plans and sections and gave notices to a land-owner indicating an intention on the part of the company merely to lay through the land-owner's property a tunnelled aqueduct at a depth of forty-five feet below the surface. The company afterwards claiming to hold the land permanently for other purposes than the purpose so indicated: *Held*, that they were not entitled to do so; and that, save for the purposes of construction, they were not entitled to take and hold permanently any other portion of the land than so much as was necessary for the construction of and would be contained within such tunnel in conformity with the plan deposited as they should deem necessary for the purposes of their works authorized by Act of Parliament.

THIS was an appeal motion on behalf of Rebecca Simpson and Elizabeth Simpson, two maiden ladies, who were the plaintiffs, and the original hearing of a motion for decree in the cause.

The appeal was from the refusal by the Vice-Chancellor Sir * 680 JOHN STUART to grant an interlocutory injunction in * favour of the appellants against the respondents the South Staffordshire Waterworks Company, and was originally brought on before the Lords Justices, when it was ordered to stand over till the hearing of the cause; and it was arranged that this should be on motion for decree to be originally heard before their Lordships, the plaintiffs having liberty to amend their bill.

The appeal motion and the motion for decree accordingly came on together before their Lordships, who were not agreed as to the form of order to be made, and suggested that the Lord Chancellor should be requested to entertain the matter; and by his Lordship's permission the whole matter was now accordingly brought before him.

The respondents were incorporated for the purpose of supplying a specified tract of country with water under certain private Acts of Parliament, passed respectively in 1853, 1857, and 1864; viz.,

Stats. 16 & 17 Vict. c. 133, 20 & 21 Vict. c. 126, and 27 & 28 Vict. c. 89, with the first two of which the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, and with the last of which those Acts and also the Lands Clauses Consolidated Acts Amendment Act, 1860, and the Waterworks Clauses Act, 1863, were incorporated.

The question at issue was as to the extent of their rights over a field belonging to the appellants.

The respondents had obtained their Act of 1864 without opposition on the part of the appellants. But this absence of opposition arose from the fact that the plans and sections deposited by the respondents, and the notices given by them to the appellants in contemplation of the passing of the Act of 1864 showed nothing beyond *an intention on the part of the respondents *681 to lay through the field in question a tunnelled aqueduct at a depth of forty-five feet below the surface. The appellants contended that the respondents' rights over the field were limited to the attainment of that object.

What the respondents, on the other hand, were doing, and what they proposed to do, and what they contended they had a right to do, was thus stated in their answer : —

“ As at present advised, we propose to construct the said aqueduct through the said field in tunnel, and for that purpose to sink one or more shafts, and we are now sinking a shaft in the same field. And we are advised and believe that it may be necessary for the purposes of the said aqueduct to sink other shafts in the said field or to make an open cutting therein. We also propose to erect and we are now erecting upon the said field a steam-engine, with engine-house, boilers, and apparatus, for the purpose of pumping water during the construction of the said tunnel into our present aqueduct and sending it into the reservoirs ; and when the said aqueduct is completed, stationary pumping engines will always be required for pumping water into our present aqueduct and sending it into the reservoirs ; and the said field is the most suitable station for such stationary pumping engines, and we propose and intend to use it permanently for that, amongst other purposes, authorized by the said Act of 1864. We also propose and intend, in exercise of the powers given to us by the Waterworks Clauses Act, 1847 and 1863, to sink in the said field such wells or shafts

from time to time as we may think proper for the supply of our prescribed limits with water, and from time to time to take such water as may be found in or under the said field, and for those (amongst other purposes) authorized by the Act of 1864

* 682 we require the said field permanently. * We have already made borings under our existing tunnel, and have procured very large supplies of water from such borings, and we are informed by our engineer, Mr. M'Clean, and believe that he has always, since it was proposed to make the said aqueduct, intended either to bore or sink a shaft or shafts, well or wells, under the proposed aqueduct for the same purpose throughout its entire length, and for those (amongst other purposes) authorized by the said Act of 1864 and the Acts incorporated therewith, we require the said field permanently."

The question turned upon the construction of the various Acts of Parliament under which the respondents were incorporated, and the material portions of these are set out below. (a)

(a) The Waterworks Clauses Act, 1847 (10 Vict. c. 17). Sect. 1. "... This Act shall extend only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed, which shall declare that this Act shall be incorporated therewith, and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby so far as the same shall be applicable to such undertaking, and shall, with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act."

Sect. 2. "... The expression 'the lands and streams' shall mean the lands and streams of water which shall by the special Act be authorized to be taken or used for the purposes thereof; and the expression 'the undertaking' shall mean the waterworks and the works connected therewith by the special Act authorized to be constructed; and the expression 'the undertakers' shall mean the persons by the special Act authorized to construct the waterworks."

Sect. 3. "The following words and expressions, in both this and the special Act, and any Act incorporated therewith, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say The expression 'the waterworks' shall mean the waterworks, and the works connected therewith by the special Act authorized to be constructed."

"And with respect to the construction of the waterworks, be it enacted as follows:—

Sect. 6. "Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the power so given to them, be subject to the

* *Mr. Greene* and *Mr. F. O. Haynes* appeared for the * 683 appellants, and

* *The Attorney-General* (Sir R. PALMER), *Mr. Malins*, and * 684 *Mr. Speed*, for the respondents.

provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845 . . . ; and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise, as to such lands and streams, of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith; and except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the said Lands Clauses Consolidation Acts respectively for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last mentioned Acts respectively shall be applicable to determine the amount of any such compensation, and to enforce payment or other satisfaction thereof."

Sect. 12. "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks; (that is to say) —

"They may enter upon any lands and other places described on the said plans and in the said books of reference, and take levels of the same, and set out such parts thereof as they shall think necessary, and dig and break up the soil of such lands and trench and sough the same, and remove or use all earth, stone, mines, minerals, trees, or other things dug or gotten out of the same :

"They may from time to time sink such wells or shafts, and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such buildings, upon the lands and streams authorized to be taken by them, as they shall think proper, for supplying the inhabitants of the town or district within the prescribed limits with water :

"They may from time to time divert and impound the water from the streams mentioned for that purpose in the special Act, or the said plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works :

"Provided always, that in the exercise of the said powers the undertakers shall do as little damage as can be, and in all cases where it can be done shall provide other watering places, drains, and channels for the use of adjoining lands, in place of any such as shall be taken away or interrupted by them, and

* 685 * The scope of the arguments sufficiently appears from the Lord Chancellor's judgment. The following authorities were referred to ; viz. —

On the part of the appellants, *Webb v. The Manchester and Leeds Railway Company*, (a) *Eversfield v. The Mid-Sussex Railway Company*, (b) *Flower v. London, Brighton, and South Coast Railway Company*. (c)

And on the part of the respondents, *The Stockton and Darlington Railway Company v. Brown*, (d) *Richards v. The Scarborough Public Market Company*, (e) *Weld v. The South Western Railway Company*, (g) *Cother v. The Midland Railway Company*, (h) *The*

shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers."

The South Staffordshire Waterworks Amendment Act, 1864 (27 & 28 Vict. c. 89), section 5: "And whereas plans and sections showing the situation, lines, and levels of the reservoirs, aqueducts, and works, by this Act authorized, and the lands required for the purposes thereof, and books of reference to the plans, have been deposited with the respective clerks of the peace for the county of Stafford, and for the city and county of the city of Lichfield: therefore it shall be lawful for the company, subject to the provisions in this Act contained, and to the powers of deviation hereby given, and to the alteration in the Seedy Mill Reservoir herein after mentioned, and to the provisions herein after contained relating to that reservoir, to make and maintain the reservoirs (other than the said Seedy Mill Reservoir), aqueducts and other works herein after described in the line and situation and on the levels and upon the lands delineated on the said plans and described in the said books of reference, and defined on the said sections, and to enter upon, take, purchase, and use such of the lands, streams, and waters mentioned in the said plans and books of reference as the company may deem necessary for all or any of those purposes, and also all or any of the mills, manufactories, and works, and the lands connected therewith, delineated on the said plans and described in the said books of reference, and to take such water as the company may require for the purposes of the Acts of 1853 and 1857, and this Act and the said incorporated Acts."

Sect. 7 was to the effect stated in the Lord Chancellor's judgment.

Sect. 8. "In constructing the said works, or any of them, the company may, notwithstanding any provisions in the Waterworks Clauses Acts, deviate to any extent not exceeding the limits of deviation shown on the said plans, and may also deviate from the levels shown on the said sections to any extent not exceeding three feet in respect of the reservoirs and in respect of aqueducts not exceeding seven feet."

(a) 4 M. & C. 116.

(b) 1 Giff. 153; 3 De G. & J. 286.

(c) 2 Dr. & Sm. 330.

(d) 9 H. L. Cas. 246.

(e) 23 L. J. (N. S.) Ch. 110.

(g) 32 Beav. 340.

(h) 2 Ph. 469.

North British Railway Company v. Tod, (a) *Stamps v. The Birmingham, Wolverhampton, and Stour Valley Railway Company*, (b) *Pinchin v. The London and Blackwall Railway Company*, (c) *Sadd v. The Maldon, Witham, and Braintree Railway Company*, (d) *Wood v. The Epsom and Leatherhead Railway Company*. (e)

* At the conclusion of the arguments the Lord Chancellor * 686 reserved his judgment.

May 6.

THE LORD CHANCELLOR. — In legislating for public undertakings and conferring compulsory powers to take land, Parliament has at all times manifested the utmost anxiety to impose upon the company or the undertakers the obligation of giving to the land-owner the most precise and definite information with regard to the quantity of land to be taken, and the manner in which the land is intended to be affected; and the enactments contained in the Acts of Parliament conferring the powers to carry an undertaking into effect will be generally found to embody by reference the plans and the notice given by the plans to the land-owners of the intention of the company.

Before adverting to the particular facts of this case in illustration of the truth of that observation, I would remark that I entirely concur in the rule laid down by Lord COTTENHAM (g) at an early time of the administration of justice with regard to railway works and other works of a similar description, that it is incumbent upon the company to prove clearly and distinctly from the Act of Parliament the existence of the power which they claim a right to exercise, and if there is any doubt with regard to the extent of the power claimed by them, that doubt should undoubtedly be for the benefit of the land-owner, * and should not be solved * 687 in such a manner as to give to the company any power which is not most clearly and expressly defined in the statute.

(a) 12 Cl. & Fin. 722.

(b) 7 Hare, 251; 6 Rail. Cas. 128; 2 Ph. 673.

(c) 5 De G., M. & G. 851, 861. (e) 30 L. J. (N. S.) C. P. 82.

(d) 6 Rail. Cas. 779.

(g) See *Webb v. The Manchester and Leeds Railway Company*, 4 My. & Cr. 116. The Lord Chancellor expressed a similar opinion to that reported in the text in the case of *Baxendale v. The West Midland Railway Company*, 5th November, 1862. That case did not, however, call for a report.

I would also further remark, with reference to a point that was much dwelt upon in the argument, namely, the effect of the incorporation of the general Act into the special Act, that the general Act must be looked at with reference to the powers conferred upon companies of dealing with the land when acquired, but that it is to the special Act that regard must be had for the purpose of ascertaining what may be called the contract between the land-owner and the company, and the power which the company has conferred upon it of taking the land of the land-owner.

With these general observations, I come first to consider what it is which in the plans and sections deposited by this company with the clerk of the peace is indicated as the manner in which the company intend to deal with the land and the extent of the land-owner's interest which was intended to be taken by the company.

Upon that point I entirely concur in the representation of the effect of the plans which is contained in one or two passages of the affidavit of Mr. Hawksley, an engineer who gives evidence on behalf of the appellants, and who says, and says correctly, "When it is intended to obtain the authority of Parliament to the sinking of wells and shafts for obtaining subterranean water, it is the common and general practice to indicate on the deposited plans and sections the situation of such wells and shafts, and to give notice to the owners and occupiers of the lands in which they are intended to be situated of such intention." He then goes on to

say that he has examined the plans deposited by the respondents for the purposes * of the Act of 1864, and that he does not find any well or shaft indicated thereon; and further observes that in the case of tunnels and other subterranean works, it is the common practice of water companies not to take the entirety of the piece of land or the surface of the land, but merely to acquire the right of carrying the tunnel through the land for the purposes of the works. He then goes on to state that the deposited plans indicate, with reference to the land of the appellants, that the entirety of the contemplated works of the company would consist of a tunnel to be driven at a certain depth with a limited power of vertical deviation, and that the operations of the company as indicated by their deposited plans are limited to that work and extend to nothing more.

Such, then, being the effect of the deposited plans, we next come to consider the language of the special Act, for undoubtedly,

although it is not the rule of Parliament, it would be competent to the legislature to confer a greater right than that which is indicated by the plans.

The material section of the special Act of 1864, that which contains the special definition of the power of the company with reference to the land of the appellants, is the fifth, and as to this section the argument was almost entirely directed I must call attention to it at some length. It first of all refers to the plans and sections deposited as showing the situation, lines, and levels of the intended aqueduct and the lands required for the purposes thereof. The preamble or narrative of the section therefore refers us to the plans for the purpose of ascertaining the land which was required. It then confers upon the company a special power "to make and maintain the reservoirs, . . . aqueducts, and other works herein after described in the line and situation and on the levels and upon the lands delineated on the said plans, * and * 689 described in the said books of reference, and defined on the said sections," and then there is a power to "take, purchase, and use such of the lands . . . mentioned in the said plans and books of reference as the company may deem necessary for all or any of those purposes." The power given to the company is to do the defined work in the described land, and the power further is to take the land or so much of it as shall be "necessary" for that work.

A great deal of argument turned upon the use and meaning of the word "necessary," and it was attempted on the part of the company to contend that that word extended as far as this; namely, that the company might take so much of the land as they should deem necessary, not for the particular work indicated, but for any collateral purpose connected with that work.

I am by no means of opinion that such an extended construction can be given to the word. I entirely concur in the conclusion, which indeed is rendered imperative by the decision of the House of Lords in the case of *The Stockton and Darlington Railway Company v. Brown*, (a) that it would be entirely within the power and judgment of the company to determine for themselves the magnitude and extent of the particular work defined, as, for example, that work being a tunnel, that the tunnel shall have a diameter of

(a) 9 H. L. Cas. 246.

six feet, or ten feet, or of twenty feet; but the word cannot be used for the purpose of extending the authority given to the company so as to enable them to add upon the land other works in addition to the works defined, and thereby to augment their power of taking the land of the land-owner beyond that which was
 * 690 indicated in the plan, and, being indicated in the * plan is embodied and transferred by reference into this section of the Act of Parliament.

The power which is given to the company is to make "the reservoirs, . . . aqueducts, and other works herein after described." The section of the Act to which those words of reference relate is the seventh section, which, so far as it is applicable to the land of the appellants, contains these words: "Subject to the provisions of this Act, it shall be lawful for the company to execute all or any of the following works shown on the said plans as the company shall from time to time deem expedient, that is to say; . . . an aqueduct constructed in tunnel or otherwise as shown on the original plans." Then the *terminus a quo* and the *terminus ad quem* of the aqueduct are defined in the section, and applying that to the plans, we find that the aqueduct here referred to and there described, where it passes through the land of the appellants, passes through it in tunnel only, and is limited entirely to the tunnel at a certain depth passing through those lands.

So far, therefore, as this fifth section and the relative seventh section are concerned, there is a definite authority conferred upon the company to make the work indicated in the plan and further described as an aqueduct consisting of a tunnel, with this license only, that they may make that work as they shall deem it necessary, which of course must be limited to the work itself, and cannot be extended to give them power to superadd to that work other works of which there is no indication and no description at all.

Then a good deal of argument was used on the part of the company, with a view to show that there were other words in this fifth section which contained by a species of implication the right
 * 691 to extend the works beyond what * was indicated in the plan. It would be very difficult to find any words admitting of such a construction when they are in immediate connection with words which give the company that precise and definite authority which I have already explained. But the words which were relied on by the company for this purpose are the concluding words of

the fifth section, by which the company is empowered to take such water as it "may require for the purposes of the Acts of 1853, 1857, and this Act, and the said incorporated Acts." The argument was of the ordinary kind; namely, that inasmuch as this was a general power to take such water from the lands as the purposes of these Acts required, it contained by necessary implication the right to do every thing which should be essential or necessary for the purpose of taking the water.

I cannot arrive at any such construction; for the effect of it would be to supersede, and in truth to annul all the directions that are previously contained, and convert the whole section into a general authority to the company to take all the water which they could in any manner acquire throughout the whole course of the lands indicated, and to do whatever they might deem necessary for the purpose of taking that water. The laborious care shown by Parliament in defining positively what they were to do, and in laying down the bounds on one side and on the other which they were not to transgress, would have been an idle superfluity had these latter words been capable of such an interpretation. It is clear that the words have only this meaning, that whilst the company are authorized to make the works, they shall have a right to take, as incident to those works and as consequential on those works, whatever streams of water the works when constructed in the line indicated might tap or bring into their tunnel, or whatever water might * percolate and flow by the natural agency of * 692 the law of gravitation from any part of the circumjacent soil into the tunnel which was to be constructed. That is the natural meaning of the words; that interpretation renders them consistent with the rest of the section, and I must adhere to that, and not adopt a wide and extended meaning which would overrule and render in point of fact superfluous, as I have already observed, the rest of the enactment.

The remaining arguments urged, and with considerable ingenuity, on behalf of the respondents were derived chiefly from the general Act of Parliament of 1847.

First, it was contended that by the interpretation clause of the general Act of 1847, which is embodied in this special Act of 1864, the word "waterworks" was defined to mean "the waterworks and the works connected therewith," and that therefore a statutory authorization to the company to make a reservoir, and to make an

aqueduct, and to make a tunnel, carried with it — inasmuch as the reservoir, and aqueduct, and tunnel were waterworks — the power to make other works connected therewith.

It would be a sufficient answer to that to say, that the particular noun “waterworks” is not to be found in the enactment of the fifth section of the special Act. But in addition, the whole argument fails, because the language of the interpretation clause is not merely that “the expression ‘the waterworks’ shall mean the waterworks and the works connected therewith,” but it is that the expression shall mean “the waterworks and the works connected therewith by the special Act authorized to be constructed.” We are again remitted therefore to the special Act, for the purpose of

ascertaining what is thereby authorized to be constructed,
 * 698 and the answer to * that question I have already endeavoured to give out of that special Act.

But this is not all, because the language of the second section of the general Act (the interpretation clause, to which I have just referred, being the third section) is definite, that the expression “the lands and streams” shall mean “the lands and streams of water which shall by the special Act be authorized to be taken or used,” and the whole tenor of this general Act of Parliament may be thus expressed, that it refers us, by anticipation, to the special Act, for the purpose of ascertaining therein what is the land to be taken, and what are the works to be done upon the land. Referring us to that, it then invests the company with certain general powers which may be useful or necessary for the purpose of carrying into effect upon the land authorized to be taken the work which, by the special Act, is definitely described.

Then another argument was derived from the twelfth section of this general Act.

That section is a general enactment beginning thus: “Subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks,” and then certain collateral works are specified; and it was said that the company, being by the special Act empowered to construct a tunnel, they are empowered by this section to add to the tunnel all these or any of these auxiliary works.

I cannot, however, put an interpretation upon this clause which will be utterly at variance with the restrictions that are care-

fully thrown round the powers of the * company in the rest * 694 of the Act, and I must take it that this general clause, beginning, as it does, " Subject to the provisions and restrictions in this and the special Act," was intended to be subjected to the same restrictions, and I construe those words therefore as meaning, subject to the company having authority by the special Act to take the lands and to construct certain works, then if they have power and space and room enough in the land which they are authorized to take to afford them an area for these additional works, they may be empowered to make these collateral and auxiliary works. For that purpose I am referred again to the Act, and I find authority to take the land for the purpose of constructing a tunnel, and that the power to interfere with the land, and to hold it permanently save for the purpose of construction, is limited entirely to a tunnel of such width and diameter and shape and construction as the company may deem necessary, but with not a particle of authority to superadd to that any additional work, either underground or upon the surface of the land to be taken.

Upon an examination of the whole matter, I think that the true interpretation of the Act of Parliament is brought back to that which is certainly consistent with the general intent and the anxious purpose of the legislature, and also with what natural justice would dictate ; namely, that the company shall not be permitted to commit a surprise upon the land-owner by telling him in the first instance that he will be required to part with so much of his land only as is necessary for a particular and a definite and expressed purpose, and afterwards telling him, " Nay, but we shall now take the whole of your land, because we deem it right to superadd to what we have expressed something in addition to something in extension of our original plan, but which was not indicated * upon the notice given to you or upon the * 695 plans and sections which we were bound to deposit, and did deposit, in order that you might know how your property would be affected by our undertaking."

Having arrived at that conclusion both upon an examination of the general Act of Parliament and the special Act of Parliament, I have no difficulty in deciding that the appellants in the present case are entitled to the relief they seek, and that, save for the temporary purposes of construction, which will be of course of a limited duration in point of time, the company are not entitled to take

and hold permanently any other portion of the appellant's land than so much as is necessary for the construction of, and will be contained within, such tunnel in conformity with the plan deposited as the company shall deem necessary for the purposes of their works authorized by the Act of Parliament. There must be a declaration in such a form as to limit the extent of ownership by the company, but at the same time to let that ownership extend to the measure in point of size, diameter, and shape of the tunnel, which the company shall deem necessary ; but *ultra* that tunnel I mean to define that nothing can be required to be yielded up by the land-owner to the company, or retained and taken permanently by the company.

June 14.

The cause was on this day spoken to on the minutes of the decree, which, as finally drawn up, was to the following effect : —

Declare that the defendants the South Staffordshire Waterworks Company are not entitled under the powers of their Acts of Parliament, or any or either of such Acts, * or of any Acts incorporated therewith respectively, to take or use permanently the surface of the field of the plaintiffs in the pleadings described, or any part of the said surface, but as respects the said field are only entitled to construct in and through the same beneath the surface thereof, an aqueduct in tunnel, as shown on the original plans in and by the 7th section of the South Staffordshire Waterworks Amendment Act, 1864, mentioned or referred to, with such alterations and deviations in the dimensions and course of the said aqueduct within the limits of deviation as by the South Staffordshire Waterworks Amendment Act, 1864, and the Acts incorporated therewith, are authorized and as the defendants may deem necessary, and also to take permanently so much of the said field beneath the surface thereof as may be necessary for the passage through and under the said field of the said aqueduct in tunnel which the defendants are as aforesaid entitled to construct, and to enter upon and use the said field (including the surface thereof) for the period not exceeding twelve calendar months from the present time, for the temporary purpose of constructing the said aqueduct in tunnel from Bourne Brook to Lichfield, being the aqueduct mentioned in the 2d paragraph of the said 7th section of the said Act of 1864.

Award an injunction to restrain the defendants, their officers, solicitors, servants and agents, from proceeding upon their notice to treat, dated the 19th day of July, 1864, (a) and from giving to the plaintiffs any fresh notice to treat save for the purpose of procuring the compensation or purchase-money to be paid by the defendants to the plaintiffs in respect of so much of the * said * 697 field as it is hereinbefore declared that the defendants are authorized to take permanently, such compensation or purchase-money to be ascertained in the mode prescribed by the Lands Clauses Consolidation Act, 1845; and also to restrain the defendants from in any way using the plaintiffs' said field, or any part thereof, save for the purpose of the construction of the said aqueduct in tunnel as shown by the said original plans, with such alterations and deviations (if any) in the dimensions and course of the said aqueduct within the limits of deviation as by the South Staffordshire Waterworks Amendment Act, 1864, and the Acts incorporated therewith, are authorized and as the defendants may deem necessary.

And the plaintiffs by their counsel consenting to the defendants retaining possession of the plaintiffs' said field for the purpose of constructing their said aqueduct in tunnel, but not for any other purpose, reserve to the plaintiffs the benefit of the undertaking of the defendants contained in the order of his Honor Vice-Chancellor KINDERSLEY made on the 5th day of August, 1864. (b)

Order that the plaintiffs, their surveyors and agents, be at liberty at seasonable times and upon reasonable * notice to * 698 the defendants in that behalf, during so long as the defendants shall retain the occupation of the plaintiffs' said field for the purpose of constructing the said aqueduct in tunnel, to enter upon and under the said field and to view and inspect the works of the

(a) This was a notice to treat for the purchase of the field in question.

(b) The appellants, on filing their bill, had moved for an injunction before Vice-Chancellor KINDERSLEY, the Vacation Judge, and upon that motion an order was made whereby the respondents were restrained until the 2d of November, 1864, from proceeding upon their notice to treat or under their compulsory powers; but the order was to be without prejudice to any question, and was made upon the consent of the appellants to the entry by the respondents upon the field in order to construct their aqueduct, and upon the undertaking of the respondents to abide by any order which might be made as to their right to take it either permanently or temporarily, and as to the mode of ascertaining the purchase-money or compensation to be paid first.

defendants upon and under the said field, and to use the apparatus and machinery of the defendants for the purpose of inspection.

Refer for taxation the costs of the plaintiffs of the cause, including their costs of the motions for an injunction before Vice-Chancellor KINDERSLEY, Vice-Chancellor STUART, the Lords Justices and the Lord Chancellor, and also the costs of the motion for a decree before the Lords Justices, and order payment thereof by the defendants to the plaintiffs.

Liberty to apply generally.

Reg. Lib. 1865, B. 1558.

*** 699 * In the Matter of The INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1862 ;**

In the Matter of The COMPANIES ACT, 1862 ;

AND

In the Matter of The SHEFFIELD AND HALLAMSHIRE ANCIENT ORDER OF FORESTERS' CO-OPERATIVE AND INDUSTRIAL SOCIETY (LIMITED).

FOUNTAIN'S CASE.

SWIFT'S CASE.

1865. April 25. May 6. Before the Lord Chancellor Lord WESTBURY.

An industrial and provident society originally formed and registered with unlimited liability under the Industrial and Provident Societies Act, 1852, was re-registered with limited liability under the Industrial and Provident Societies Act, 1862, and ordered to be wound up thereunder : *Held*, that past members who had held fully paid-up shares in the society were not liable to be put on the list of contributories.

THIS was an appeal by the official liquidator of the Sheffield and Hallamshire Ancient Order of Foresters' Co-operative and Industrial Society (Limited) from an order of Mr. ELLISON, the Judge of the Sheffield County Court, whereby his Honor struck the names of the respondents Richard Fountain and George Edward Swift off the list of contributories.

The society was formed in April, 1861, with unlimited liability, and was registered as such under the Industrial and Provident Societies Act, 1852, and the other Acts then in force relating to such societies.

After an ineffectual endeavour to obtain, first from the Master of the Rolls, and afterwards from the Lord Chancellor, an order to wind it up in Chancery under the Companies Act, 1862, the society was registered under the Industrial and Provident Societies Act, 1862, and a winding-up order was then made by the Sheffield County Court under that Act.

*The respondents had each of them been holders of fully *700 paid-up shares. They had, however, parted with them before the registration of the society under the Industrial and Provident Societies Act, 1862; and the respondent Richard Fountain had in addition ceased to be a member of the society for a period of upwards of a year prior to the commencement of the winding up.

Mr. Druce, for the appellant. — The order under appeal is wrong, and these gentlemen ought to be placed on the list of contributories. It would be the height of injustice to hold that the registration of the company with limited liability under the Industrial and Provident Societies Act, 1862, — it having been originally registered with unlimited liability under the prior Acts, — can absolve them from their liability to the debts of the company, at whatever period of its existence incurred. The principles upon which the Courts proceeded in *In re Plumstead, &c. Water Company*, (a) *Ex parte Stevenson*, (b) and *The Garnet and Moseley Gold Mining Company v. Sutton*, (c) with reference to companies registered with unlimited liability under the Stat. 7 & 8 Vict. c. 110, and subsequently registered with limited liability under the Joint-stock Companies Act, 1856, are still in point. But unless the respondents can be made liable as contributories, they cannot be made liable at all; for the right of action against the trustees or registered officers of the society is taken away by the operation of the first section of the Industrial and Provident Societies Act, 1862 (*Toutill v. Douglas*, (d)) and with it falls the subsequent right which would *otherwise have accrued as *701

(a) 2 De G., F. & J. 20.

(c) 6 B. & S. 326.

(b) 32 L. J. (N. S.) Ch. 98.

(d) 33 L. J. (N. S.) Q. B. 66.

against individual members of the society by way of *scire facias*; *Myers v. Rawson*. (a) The effect of the 85th and 87th sections of the Companies Act, 1862, which by the terms of the 17th section of the Industrial and Provident Societies Act, 1862, are incorporated with that Act, tend in the same direction. But this incorporation of the two Acts has the effect of also incorporating with the use of the word "contribute" in the Industrial and Provident Societies Act, 1862, the definition of a contributory contained in the 74th section of the Companies Act, 1862, and of including the respondents thereunder; while the 194th section shows that registration under that part of the Act is not to affect obligations previously incurred. (b)

(a) 5 H. & N. 99.

(b) The following are the sections of the various Acts referred to in the argument and in the Lord Chancellor's judgment, so far as they are material:—

The Joint-stock Companies Act, 1856 (19 & 20 Vict. c. 47):

Sect. 116. "The registration of any existing company under this Act shall not, nor shall any Act of the company subsequent to such registration, prejudice any right which previously to such registration has, or which would, if no such registration had taken place, have accrued to any creditor or other person against the company in its corporate capacity, or against any person then being or having been a member of such company, but every such creditor or other person shall be entitled to all such remedies against the company in its corporate capacity, and against every person then being or having been a member of such company, as he would have been entitled to in case such registration had not taken place."

The Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87):

Sect. 1. "The Industrial and Provident Societies Act, 1852, and the said recited Acts for the amendment hereof, are thereby repealed from the passing of this Act."

Sect. 17. "Any society registered under this Act may be wound up either by the Court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any Acts or Act for the time being in force for winding up companies; and all the provisions of such Acts or Act with respect to winding up shall apply to such society, with this exception, that the Court having jurisdiction in the winding up shall be the county Court of the district in which the office of the society is situated."

Sect. 20. "In the event of a society registered under this Act being wound up, every present and past member of such society shall be liable to contribute to the assets of the society to an amount sufficient for payment of the debts and liabilities of the society, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say),

"(1) No past member shall be liable to contribute to the assets of the society

* *Mr. Elderton*, for the respondents, was not called upon. * 702

* The Lord Chancellor said he could not accede to the * 703 application. For the purpose of winding up this society and of determining the liabilities of its members, as between themselves, it must be taken as the Court found it, and that was a limited society. And that being so, the respondents were not liable to contribute, for they had paid to the full amount of their shares. It had been contended that the Industrial and Provident Societies Act, 1862, under which the society was then registered, incorporated the Companies Act, 1862, and therefore the 74th section of that Act. But even if it were so, his Lordship was not of opinion that any such assumed incorporation could override the express provisions of the 20th section of the Industrial and Provident Societies Act, 1864. Nor had the 194th section of the Companies Act, 1862, any more than the case of *The Garnet and* if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up.

“(4) No contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a past or present member.”

The Companies Act, 1862 (25 & 26 Vict. c. 89):

Sect 74. “The term ‘contributory’ shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up: it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.”

Sects. 85, 87 are set out above, p. 379, note.

Sect. 194. “The registration in pursuance of this part of this Act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of such company previously to such registration.”

Sect. 195. “All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this Act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company.”

Moseley v. Gold Mining Company v. Sutton, (a) any application to the case of pure contribution, which was founded on the contract of partnership. For the purpose of deciding whether or not the respondents were contributories, it was not necessary to consider what were the rights of creditors or external claimants. The consideration was simply, whether, where a society was a limited partnership and had become the subject of a winding-up order, the members of that society who, upon the principle of limited partnership, had nothing to contribute, because they had paid to the full amount of their shares, must nevertheless be made to contribute because of the possible existence of unsatisfied creditors of the society. His Lordship thought not. There might be some failure of justice in the absence of some statutory machinery corresponding to that contained in the 116th section of the Joint-stock Companies Act, 1856; but his Lordship could not, on that ground, supply by decision the deficiency, if such there were, and the appeal must be dismissed.

1864. November 14. 1865. May 10. Before the Lord Chancellor Lord WESTBURY.

Family estates stood limited to an eldest son for life, with remainder to his male issue in tail, with remainder to the second son for life, with remainder to his male issue in tail, with remainder to the eldest son's female issue in tail, with remainder to the second son's female issue in tail, with remainders over. The eldest son and his wife were divorced, at the husband's suit, by a decree of the Divorce Court; but no child of the marriage having been born during a cohabitation of six years, a female child was born of the wife after an interval of nearly eighteen months after cesser of cohabitation with her husband, a few weeks only after the decree *nisi* in the Divorce Court was pronounced, but before the decree absolute was pronounced. The child must have been begotten before the proceedings in the Divorce Court were instituted. The eldest son taking no steps to raise the question of the legitimacy of the child, and neither he nor the second son having any male issue, a small personal settlement was, after the decree absolute, made by the mother of the eldest son, with the privity of the second, for the express purpose of raising the

(a) 6 B. & S. 326.

question, the settlement giving successive interests to the children living at its date of the marriage between the eldest son and his then divorced wife and to the second son. The latter then filed a bill to have the trusts of the settlement carried into execution, upon an allegation that the trustee declined to act except under the direction of the Court, charging the illegitimacy of the child, and claiming an immediate interest in the trust fund. The settlement was admittedly made for the purpose of settling the succession to the family estates. The child, by her counsel, disclaimed at the bar any right under the settlement: *Held* (affirming the decision of Vice-Chancellor Sir W. P. WOOD, but on other grounds, and disapproving of *Gurney v. Gurney*, 1 H. & M. 413), that a suit so circumstanced, being merely manufactured for the purpose of compelling the present trial in an indirect way of an important question affecting the title to large estates, namely, the *status* of legitimacy or illegitimacy of the infant, was not maintainable.¹

THIS was an appeal by the plaintiff from the dismissal of his bill with costs by the Vice-Chancellor Sir WILLIAM PAGE WOOD.

The case in the Court below is reported as an anonymous case in the second volume of Messrs. Hemming & Miller's Reports. (a)

Shortly stated, the facts of the case were as follows: —

So far as appeared from the bill, the object of the suit was to have the trusts of an indenture of settlement, dated the 2d of December, 1863, carried into execution * under the * 705 decree of the Court, with a declaration that there never was any issue of the marriage between the appellant's elder brother and his divorced wife, and that the appellant was consequently entitled to an immediate life-interest in the trust fund.

The settlement in question was one of a sum of 1000*l.* consolidated bank annuities, transferred by the mother of the appellant, in consideration of family affection, into the name of a trustee, in trust for all the children then living of the marriage between the appellant's elder brother and his divorced wife, who was mentioned by her maiden name, in equal shares, and if there were only one child then living of that marriage then for such one child; with an imperative maintenance clause in favour of any such children during their respective minorities; with remainder to the appellant for life; with remainder to any wife of the appellant for life, if he should so by deed or will appoint; with remainder to the appellant's children as he should by deed or will appoint; or, in default of appointment, to such children being sons at twenty-one, or

(a) Page 124.

¹ See cases cited in note (1) to *Forrest v. The Manchester, Sheffield, and Lincolnshire Railway Co.*, 4 De G., F. & J. 126:

daughters at twenty-one or marriage; with remainder to the appellant absolutely.

The appellant's elder brother and his subsequently divorced wife were married in April, 1855. They cohabited until May, 1861, without any issue being born of the marriage. In May, 1861, the wife eloped from her husband's house and her cohabitation with him ceased; and in March, 1862, she accompanied her paramour to the Continent. In June, 1862, the appellant's elder brother instituted a suit in the Divorce Court against his wife and her paramour as co-respondent for a dissolution of the marriage; and a decree *nisi* in the husband's favour was pronounced in November, 1862. On the 8th of December, 1862, a female

* 706 child, the * present infant respondent, was born of the wife, and the child was, in February, 1863, baptized under the paramour's name. The decree *nisi* became absolute on the 17th of March, 1863. In the following June the divorced wife intermarried with the paramour, who subsequently died. As already stated, the settlement, which it was the ostensible object of the suit to have carried into execution, was made in December, 1863. Neither the appellant nor his elder brother had any male issue.

The bill, which was filed against the infant child of the divorced wife and the trustee of the settlement as defendants, alleged that the infant respondent called herself and pretended to be the child of the marriage between the appellant's elder brother and his divorced wife, and as such claimed the whole of the trust fund, and insisted that the trustee should immediately apply the whole of the income for her maintenance; that the appellant, on the other hand, insisted that the infant respondent was not the child of the marriage; and that there was no child of the marriage living at the date of the indenture; and that the appellant was entitled to an immediate life-interest in the trust fund, and that the trustee declined to act except under the direction of the Court.

The infant respondent, by her guardian *ad litem*, having filed the usual infant's answer only, and the plaintiff having set the cause down to be heard on replication and filed affidavits to show the infant respondent's illegitimacy, notice was given on behalf of the latter to cross-examine at the hearing the appellant and his mother, the settlor of December, 1863, amongst other of the appellant's witnesses; but, in order to avoid the publicity

* 707 of this, it was arranged that an affidavit * should be made

by the appellant and his mother, stating the circumstances under which the settlement came to be executed.

From this affidavit it appeared that the settlement was made by the settlor, with the privity of the appellant, and in the interests of the family, and for the express purpose of raising during the joint lives of the appellant's elder brother and his divorced wife, and getting a judicial decision upon, the question of the legitimacy of the infant respondent; that the object in raising the question was to determine whether the infant respondent would, in default of male issue in tail of the appellant's elder brother and the appellant respectively, and after their own respective deaths, be entitled in tail to the family estates, which were of large annual value, as female issue of the appellant's elder brother, the female issue of the appellant being the next in remainder, with remainders over; that the suggestion of raising it proceeded from the surviving trustee of the family settlement; and that the appellant's elder brother declined taking any steps in the matter, or being a party to the settlement of December, 1863, or the filing of the bill, or the raising of the question of the infant respondent's legitimacy; but that, on the other hand, he had not remonstrated or protested against or stated any objection to the steps which were being taken.

The infant respondent by her counsel disclaiming at the bar, the Vice-Chancellor made the order under appeal, distinguishing the present case, in which the injured husband took no part, and the mother of the child must be assumed not to wish to raise the question of its legitimacy, from that of *Gurney v. Gurney*, (a) in * which the husband was the moving party, and * 708 to which decision his Honor expressed his adherence, and dismissing the bill, with costs.

Mr. Giffard and *Mr. Godfrey Lushington*, for the appellant, contended that *Gurney v. Gurney* (a) was rightly decided, and that there was no substantial ground for distinguishing the present case from it. Statutory enactment and public policy were alike unopposed to the institution of such a suit as the present. The honour of the family required that the question of the social *status* of the infant respondent should be determined as speedily

(a) 1 H. & M. 413.

as possible ; and of that honour the appellant, as the second son, was the proper custodian if his elder brother refused or declined to move. Nor could it be said to be otherwise than in the interest of the infant respondent herself that a question so vitally affecting her and the mode in which she should be brought up should be settled at once.

They referred to the cases cited in *Gurney v. Gurney* (a) and to Maine's Ancient Law. (b)

At the conclusion of their arguments, the Lord Chancellor, without calling on *Mr. Overend* and *Mr. Bagshawe*, for the infant respondent, or *Mr. Roundell*, for the trustee, reserved his judgment ; expressing, however, a present opinion against the appellant's contention, for reasons in substantial accordance with those subsequently expressed in his Lordship's judgment.

1865. May 10.

* 709 *THE LORD CHANCELLOR. — The settlement or declaration of trust on which this suit is founded is a fraudulent instrument ; that is to say, it was prepared and executed for a purpose different from that which is expressed and apparently intended by the instrument. It was not the desire or the real object of the parties to make a *bonâ fide* settlement of property or to confer any benefit on the infant defendant. The settlement was intended only to serve as a reason or occasion for the institution of this suit, the object of which is to bastardize the infant.

Secondly. The refusal of the trustee on which the suit pretends to be instituted was wholly collusive and unreal.

Thirdly. There is no real controversy, for there is no opposition of interest. The infant, who alone has a contrary interest under the trust to that of the plaintiff, by her counsel very properly disclaims and repudiates all right and title under the settlement.

Fourthly. The suit pretends and affects to be instituted for the purpose of determining the alleged right or claim of the infant defendant to this small trust property ; but in reality it is manufactured for the purpose of compelling the present trial, in an indirect way, of a most important question affecting the title to

(a) 1 H. & M. 413.

(b) Page 25.

large estates ; namely, the *status* of legitimacy or illegitimacy of the infant.

It is wholly contrary to the principles which govern the administration of justice that any person should be permitted by means of an unreal trust, designed and created for the purpose, to force another person as defendant in a collusive suit to try prematurely and against * his will an important right or title * 710 which has not yet arisen or come into possession, so as to admit of its being brought forward and prosecuted in the regular and legitimate manner.

I approve, therefore, of the Vice-Chancellor's decision in the present case ; but I cannot at all assent to the principles or reasoning on which his former decision in the case of *Gurney v. Gurney* (a) was founded.

The petition of appeal must be dismissed, with costs. (b)

SWIFT v. SWIFT.

1865. March 18. May 11. Before the LORDS JUSTICES.

A husband, who had indecently conducted himself towards an infant female child of the marriage, and separated from his wife in consequence, covenanted in the separation deed that the children of the marriage (who were infants) should at all times thereafter be under the sole care, management, and protection of the wife: *Held* (by the Lord Justice TURNER, affirming the decision of the Master of the Rolls, but *dissentiente* the Lord Justice KNIGHT BRUCE), that the covenant was not contrary to public policy, and was enforceable in equity at the suit of the wife ; but *held*, also (by the Lords Justices), that an injunction consequently granted against the husband to restrain him from proceeding to obtain the infant children from the custody of the wife should not be a perpetual injunction, but one until further order only.

Per the Lord Justice KNIGHT BRUCE: The fact of the particular covenant being contrary to public policy did not vitiate the rest of the deed.

Per the Lord Justice TURNER: Whether the covenant being treated as not contrary to public policy would have been enforced at the suit of the wife, had she also been guilty of misconduct. *Quære*.

(a) 1 H. & M. 418.

(b) See a similar *ratio decidendi* in the case of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company*, 4 De G., F. & J. 126.

THIS was an appeal by the defendant Robert Swift, the husband of Mary Ann Swift, the plaintiff in the suit, from a decree made by his Honor the Master of the Rolls, to the effect and under the circumstances herein after mentioned.

* 711 * The case in the Court below is reported in the 34th volume of Mr. Beavan's Reports, (a) where the facts are fully stated. For the purposes of this report the following statement of them is sufficient: —

The suit was instituted by the respondent, a married woman suing by her next friend, against her husband, the appellant, for an account and payment of what was claimed to have become due to her in respect of annuities which the appellant, by a deed of separation between him and her, covenanted with a trustee, who was also named as a defendant to the suit, but who was out of the jurisdiction of the Court, to pay to her for her maintenance and for the maintenance of a son and daughter, the children of the marriage, both of whom were infants; and also for an injunction to restrain the breach of a covenant on the part of the appellant contained in the deed of separation, that the children of the marriage should at all times thereafter be under the sole care, management, and protection of the wife.

The separation deed contained the usual covenant by the trustee for the indemnity of the husband, but it was not executed by the trustee until after the filing of the bill.

The bill stated the occasion of the separation of the wife and her husband to have been indecent conduct alleged by a daughter, one of the infant children of the marriage, to have been committed towards her by the appellant.

* 712 The appellant by his answer denied the indecent * conduct imputed to him, and brought a charge against his wife of intemperance and adultery. He admitted, however, an attempt to remove one of the children, the same daughter as to whom the charge of indecent conduct was preferred, from the custody of the wife.

Upon the hearing of the cause the Master of the Rolls was of opinion that the charge of indecent conduct made by the bill against the appellant was established by the evidence, but that the evidence failed to establish the charge against the wife of intemper-

(a) Page 266.

ance and adultery ; and his Honor accordingly made a decree by which he ordered a perpetual injunction against the appellant to restrain him from proceeding to obtain the infant children from the custody of the wife, and directed an account of what was due in respect of the annuities. The appeal was from this decree.

Upon the case coming before the Lords Justices on this appeal it was heard in private, and left in their Lordships' hands upon a statement by the parties of the points on which they respectively relied.

The material points relied upon on the part of appellant were, that the conclusion at which the Master of the Rolls arrived upon the evidence was erroneous ; that the covenant as to the children being under the sole care of the wife was void as being opposed to public policy ; that the charge against the defendant of indecent conduct was not sufficiently alleged by the bill ; and that the deed of separation was not executed by the trustee until after the bill was filed.

Mr. Baggallay and *Mr. W. Morris* appeared for the respondent, and

Mr. Selwyn and *Mr. Bromehead*, for the appellant.

* At the conclusion of the arguments their Lordships * 713 reserved their judgments, which they afterwards delivered in open Court to the following effect : —

May 11.

The Lord Justice KNIGHT BRUCE on the evidence thought with the Master of the Rolls that the separation deed had been executed by the trustee before the hearing of the cause, although not until after the bill was filed ; that the wife's accusation against her husband was, but that his countercharge against her was not, well founded ; and that the appellant had been shown to be unfit to have the care and management of the children. His Lordship also thought that there was a sufficiency of allegation in the bill of misconduct on the part of the appellant.

The separation deed, however, upon which the suit was to a considerable extent, if not wholly, based, appeared to his Lordship to some extent to contravene the policy of the law — whatever might be the demerits of the husband — in the stipulation contained in it,

that the children should be at all times thereafter under the sole care of their mother ; but this did not vitiate the residue of the instrument, which must be held as to a great part of it to be binding. The decree made by the Master of the Rolls, however, went too far in granting a perpetual injunction, and ought in his Lordship's judgment to be varied so as to restrain the appellant until further order only from removing or interfering with the children.

His Lordship was also in favour of directing a reference to Chambers to approve of a scheme for the education and care of the children ; but as the infants were not parties to the suit, and as the Lord Justice thought there should not at present be a
* 714 reference to * approve of a full scheme for the proposed purpose, his Lordship would not press the point.

The Lord Justice TURNER, after stating the facts and the mode in which, upon a statement by the parties of the points upon which they respectively relied, the case had been left in their Lordships' hands to the effect of the statements above contained, proceeded to say that he had considered these several points, and that his Lordship's judgment was that they did not furnish any sufficient ground for impeaching the substance of the decree.

His Lordship agreed with the Lord Justice and the Master of the Rolls in their estimate as to the result of the evidence.

He thought that the covenant in question was not void upon the ground of public policy. The power of a Court of Equity to control the rights of a father over his children in cases where he had grossly misconducted himself was indubitable ; and where the father having thus misconducted himself had covenanted not to exercise his paternal rights, his Lordship saw no ground on which the Court could refuse to recognize such a covenant. The father in such a case had done no more by his covenant than the Court would have done in its absence. Had, indeed, the imputation which in the present case the appellant had brought against his wife been well founded, the Court might have refused in this case to enforce the covenant ; but that imputation failed, and his Lordship saw no ground for refusing to enforce the covenant. The cases which had been referred to on behalf of the appellant went to this extent only, that the Court would not permit the right to the custody of the children to be made a mere matter of bargain and agreement between the husband and wife upon a separation

between them. They fell far short of deciding that * where * 715 the husband had misconducted himself towards the children, he could not by a separation deed or by any other deed covenant not to set up his paternal rights. The provisions also in the Divorce Act went far towards showing that there was no principle of public policy to prevent him from so doing.

As to the alleged insufficiency of the allegations in the bill, his Lordship thought it clear that the appellant had been in no way misled by any such insufficiency. In fact, he has joined issue upon the charges actually made against him.

As to the deed not having been executed by the trustee until after the bill was filed, his Lordship thought it was sufficient that the trustee had executed it before the cause was heard. It was the duty of the Court to dispose of the case as it stood at the hearing. The deed, when executed, became, his Lordship apprehended, good *ab initio*.

In his Lordship's judgment, therefore, the decree appealed against was in substance right.

But having regard to the nature of the covenant contained in this deed, his Lordship thought that the injunction should not have been made perpetual. The covenant was that the children should at all times thereafter be under the sole care, management, and protection of the wife. There might thereafter be misconduct on her part, or other circumstances might arise to render it inexpedient that this covenant, valid though it were, should be strictly enforced. It seemed to his Lordship that the injunction should have been until further order only; such, in fact, had been the usual form of order in cases where the Court had interfered with the paternal rights over children.

*To this extent, therefore, the decree required alteration. * 716 But the alteration was one of form rather than of substance, and the costs of the appeal must be paid by the appellant.

AUSTIN v. AUSTIN.

In the Matter of MARY ELLEN AUSTIN, an Infant.

1865. May 25, 27. Before the Lord Chancellor Lord WESTBURY.

The father of an infant of nearly three years old, originally a Protestant, had died a Roman Catholic and intestate. His widow married again. The Court committed the guardianship and custody of the child, until it should attain the age of seven years, to the mother, her second husband and her brother-in-law, all Protestants, deeming it requisite, in consequence of the child's tender age and delicate health, that it should continue under its mother's care, with persons associated with her; but the Court declared that, under the circumstances of the case, the child ought to be brought up in and educated, when capable of receiving religious education, as a member of the Roman Catholic church; and directed that when she attained the age of seven years application should be made to the Court respecting her guardianship, and education and religious instruction.¹

THIS was an appeal by John Austin, the paternal uncle of the infant Mary Ellen Austin, from an order made by the Master of the Rolls upon two adjourned summonses with reference to her guardianship and the custody of her person and estate, seeking also directions respecting her residence and education, and particularly for her education in the Roman Catholic faith.

The case in the Court below is reported in the 34th volume of Mr. Beavan's Reports. (a)

William Michael Austin, the infant's father, was a member of a Protestant family, and was educated as a Protestant, but he became a Roman Catholic; and having in July, 1861, after a considerable interval from the time of his change, publicly professed himself a Roman Catholic, * he in the following week married the respondent Ellen Seager, then Ellen Burnley, spinster, an infant of about nineteen years of age, and a Protestant. The marriage ceremony was performed first according to the forms of the Roman Catholic church and then according to Protestant forms. No agreement was entered into with respect to the religious education of any children of the marriage; and Mrs. Austin, during her wedded life with William Michael Austin, which lasted

(a) Page 257.

¹ See *In re Newbery*, L. R. 1 Ch. Ap. 263.

for a period of seventeen months only, conformed to the religious observances of the Roman Catholic church.

In November, 1861, William Michael Austin caused the draft of a will to be prepared, in which he expressed his wish and directed that all and every child and children of his should be educated and instructed in the principles and tenets of the Roman Catholic religion. This will was engrossed from the draft, but never executed.

The infant was born in June, 1862. In July, 1862, she was baptized at the Roman Catholic chapel at Pontefract, one of her sponsors being a Protestant, the other two being respectively a Roman Catholic lady and the appellant, who was also a Roman Catholic.

William Michael Austin died intestate in December, 1862, after an illness of about a month's duration, during which, according to the respondent Ellen Seager's evidence, he expressed no wishes as to the religion of the infant.

The appellant and William Michael Austin had been partners in business, and after the death of William Michael Austin intestate the appellant instituted the suit of *Austin v. Austin* as plaintiff against the widow and the infant as defendants to have the partnership accounts taken and the intestate's estate administered.

* In October, 1864, the widow married the respondent * 718 James Morrison Seager (who was a Protestant), and resumed Protestant observances.

On the 11th of the following November the appellant took out a summons, seeking to have the guardianship and custody of the infant committed to him or some other of the infant's relations on the father's side, in order that she might be brought up as a Roman Catholic; and he adduced evidence to show that the religious education of a Roman Catholic child should, if the child could speak, begin at a period not later than two to three years of age.

On the 15th of November, 1864, the respondent Ellen Seager took out a cross-summons, seeking to have the guardianship and custody of the infant committed to her, adducing evidence to show the great delicacy of the child's constitution, — a delicacy requiring the watchful and tender care of a mother, — and her extreme backwardness in articulation and inability to pronounce more than about six words, and those only in monosyllables.

On hearing these summonses and upon the suggestion of the

respondent Ellen Seager's counsel as to the association of another person with her, the Master of the Rolls committed the guardianship and custody of the infant to her, associating with her a Mr. William Wood, the husband of her sister, and a Protestant; and his Honor declined to give any directions respecting the infant's education, leaving that to be dealt with on an application to be made by the guardians after the lapse of a few years.

This was the order under appeal.

* 719 * *The Attorney-General* (SIR ROUNDELL PALMER), *Mr. Baggallay*, and *Mr. Bagshawe*, for the appellant. — The draft will caused to be prepared by William Michael Austin in this case is clear proof of his desire that his children should be brought up as Roman Catholics, and to that desire the Court is bound to give effect. If, however, it be considered that his non-execution of that will deprives it of all character as an expression of his desire, then the Court will follow his own religion and educate his infant daughter in the same. *Talbot v. The Earl of Shrewsbury*, (a) *In re North*, (b) *In re Hunt*. (c) For this end, if the Court thought in the present case that it was for the infant's benefit that she should not be removed from her mother's custody for the present, yet some control should have been placed over the mother, either by the appointment, as a guardian with her, of one of her father's Roman Catholic relations, who would see that the child was brought up in that communion, or by the giving of some directions that she should be so brought up. If this is not done, and the child be by the connivance of the Protestant guardians brought up as a Protestant, the Court may refuse then to interfere. *Witty v. Marshall*, (d) *Stourton v. Stourton*, (e) *Davis v. Davis*, (g) and *Re Byng*. (h)

Sir Hugh Cairns, *Mr. Selwyn*, and *Mr. Kay*, in support of the order of the Master of the Rolls, were only heard on the question whether it would not be proper to make some declaration as to the obligation of bringing the child up, when capable of receiving

* 720 religious * education, as a member of the Roman Catholic communion. They contended that such a prospective

(a) 4 M. & C. 672, 686.

(d) 1 Y. & C. C. C. 68.

(b) 11 Jur. 7.

(e) 8 De G., M. & G. 760.

(c) 2 Con. & Law. 373.

(g) 10 W. R. 245.

(h) Before the Master of the Rolls in 1859, but not reported.

declaration, as it must necessarily be in such a case as the present, was unprecedented in fact, and contrary to the constant habit of the Court not to make declarations with reference to matters not immediately before it. The Master of the Rolls had expressed his desire that, at the proper time, the matter should be brought before the Court by the guardians for further directions.

A reply was not heard.

THE LORD CHANCELLOR. — The law of this country enables a father to appoint the guardians of his infant child, and thereby, both directly and through the selection of those guardians, to determine the character of its religious education on the death of the father. This Court assumes the paternal duty, and is therefore bound to fulfil that duty in the manner in which it has a right to assume the father himself would have discharged it, had he lived. Where consequently clear proof exists of the father's particular religious persuasion, — that being Christian, — it is the duty of the Court to see that the children are brought up in that religious persuasion in which it assumes the father would himself have had them educated. With regard, however, to an infant of tender years, to lay down a prospective scheme of religious instruction would be idle. The physical well-being of the child is, in the tender years of infancy, the thing most to be cared for, and that by every law of nature is best cared for and best secured by the superintendence and the natural affection of the mother.

On the present occasion, therefore, I give no directions * touching this infant's religious education, finding, as I do, * 721 that her physical well-being demands that she be left under the care of her Protestant mother, associated — in order that the Court may have complete security over the child — with other persons, who — in order to obviate that interference during the tender years of infancy which would not tend to the benefit of the child, but might produce an amount of discord and contention, greatly interfering with her comfort — may well be persons of the same feelings as the mother herself.

But inasmuch as, in order to secure during these tender years what I deem to be essential for the physical welfare of the child, I am handing her over to Protestant guardians, I deem it right that the order I make shall on its face show my reasons for so doing, in order to prevent the existence of the order from being hereafter

perverted into an argument that the Court intended now to decide the question as to what ought to be the rule for her religious education adversely to the faith of her father.

I propose, therefore, that my order shall contain a preface framed with no reference to a future state of things, but merely with reference to the actual state of things, and with a view as well to vindicate the principles upon which the Court acts in these cases and lay down the rule hereafter to be resorted to when the child is of an age to receive religious instruction, as to prevent a future perversion of the order itself.

His Lordship then dictated the form of the order to be made, and which was afterwards drawn up to the effect set forth below, and by consent the costs of the appeal were directed to be paid by the appellant.

* 722 * The order as drawn up was to the following effect:—

It appearing to the Court that the father of the infant was a member of the Roman Catholic church at the time of his marriage with Ellen Seager; that he was also a member of the Roman Catholic church at the time of the birth and of the baptism of the child; that the child was baptized into the Roman Catholic church, and that the father continued a member of the same church down to and at the time of his death, and having regard to the circumstances, declare that the child ought to be brought up in and educated, when capable of receiving religious education, as a member of the Roman Catholic church; but having regard to her tender age and to the condition of her health, the Court deems it requisite that she should continue under the care of her mother and of persons to be appointed with her in order to secure the welfare of the child and the control of the Court over her condition. Then followed an appointment, until the child should attain the age of seven years, or until further order, of the mother and the husband of the mother, James Morrison Seager, and the gentleman already appointed by the Master of the Rolls, Mr. William Wood, as joint guardians of the child's person and estate, and a direction that when she should attain the age of seven years an application should be made to the Court respecting her guardianship, education, and religious instruction, with general liberty to apply in the mean time. (a)

(a) Reg. Lib. 1865, A. 1092.

* MUNRO v. THE WIVENHOE AND BRIGHT- * 723
LINGSEA RAILWAY COMPANY.

1865. June 13, 14, 15. Before the LORDS JUSTICES.

Disputes arose between a contractor for the construction of a railway and the company for whom the railway was to be constructed as to the time which the works done had taken for their execution; as to the probable time within which the railway could be finished; and as to defaults in the execution of works and in payment, which were alleged on the one side and denied on the other, and as to which there was a considerable conflict of evidence. The contract and specification provided, amongst other things, that if the contractor failed to proceed with the works in the manner and at the rate of progress required by the company's engineer, the contract should be, at the option of the company, but not otherwise, considered void so far as related to the work remaining to be done, and that all sums of money which might be due to the contractor, together with the materials and implements in his possession, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the company and the amount considered as ascertained damages for breach of contract. The company, seeking to avail themselves of these provisions in the contract on the ground of alleged default on the part of the contractor, claimed the right of completing the works themselves. The contractor thereupon filed a bill against them, seeking an injunction to restrain them from declaring the contract void as to work remaining to be done, and from declaring the amount remaining due to him for work already done under the contract forfeited, and from taking possession of the materials and implements in his possession or belonging to him. He then moved interlocutorily for an injunction in the terms of the prayer of his bill, and also for an injunction to restrain the company from entering upon the line of railway mentioned in the contract: *Held*, that, —

1. The case was not one for an interlocutory injunction.¹
2. An injunction granted upon an interlocutory application cannot exceed that prayed by the bill.²

Upon an interlocutory motion, counsel are entitled to use any affidavit which is in existence at the time when they are called upon to address the Court.³

THIS was an appeal by the plaintiff William Munro from the refusal by the Vice-Chancellor Sir JOHN STUART to grant an injunction against the defendants the Wivenhoe and Brightlingsea

¹ 2 Joyce Inj. 910, 911.

² 1 Dan. Ch. Pr. (4th Am. ed.) 388; 2 ib. 1618, 1619, and note (1).

³ See 2 Joyce Inj. 1290 and cases cited; 2 Dan. Ch. Pr. (4th Am. ed.) 1598, 1671; Kerr Inj. 615, 616.

Railway Company, the present respondents, upon an interlocutory motion.

The cause related to disputes between the appellant, the contractor for the construction of the railway, and the respondents, for whom the railway was to be constructed. Various disputes had from time to time arisen between the respective agents * 724 of the parties as to the * time which the works done had taken for their execution ; as to the probable time within which the railway could be finished ; and as to defaults in the execution of works and in payment, which were alleged on the one side and denied on the other, and as to which there was a considerable conflict of evidence.

The contract between the appellant and the respondents, which was dated the 25th of January, 1864, and the annexed specification, contained provisions for the payment of the appellant upon the certificates of the respondents' engineer, who was to be bound to certify only for such amounts as he might think proper, and was armed with power, if dissatisfied with the nature or mode of proceeding in, or with the rate of progress of, the work, to procure and make use of all necessary labour and materials for finishing it, deducting the cost thereof from what should be due to the appellant. And it was also provided that, if the appellant failed to proceed with the works in the manner and at the rate of progress required by the engineer, the contract should be, at the option of the respondents, but not otherwise, considered void so far as related to the work remaining to be done ; and that all sums of money which might be due to the appellant, together with the materials and implements in his possession, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the respondents, and the amount considered as ascertained damages for breach of contract.

The respondents, seeking to avail themselves of these clauses in the contract on the ground of alleged default on the part of the appellant, claimed the right of completing the railway works themselves.

The appellant thereupon filed the present bill against * 725 * the respondents as defendants, alleging, amongst other things, an undue withholding of certificates by the respondents' engineer, and praying a declaration that such withholding of certificates was a fraud on the appellant, and that he was enti-

tled to receive the sums for which the certificates ought to have been granted ; an account ; and an injunction to restrain the respondents from declaring the contract of the 25th January, 1864, to be void as to work remaining to be done and performed ; from declaring the amount remaining due to the appellant for work already done under the contract to be forfeited ; and from taking possession of any materials and implements in the appellant's possession or belonging to him.

The cause had not been heard nor was ripe for hearing ; but, on interlocutory motion, the appellant sought from the Vice-Chancellor an injunction in the terms of the prayer of the bill, and in addition an injunction to restrain the respondents from entering upon the line of railway mentioned in the contract.

The Vice-Chancellor refused the injunction, and the respondents accordingly proceeded to exercise the right which they claimed to complete the works themselves. The works, however, were not yet completed.

Mr. Malins and *Mr. E. K. Karlake* appeared for the appellants, and

Mr. Bacon and *Mr. F. Webb*, for the respondents.

The case was argued at great length, and *Kemp v. Rose*, (a) *Pawley v. Turnbull*, (b) *Scott v. The * Corpora- * 726 tion of Liverpool*, (c) *Ranger v. The Great Western Railway Company*, (d) *M'Intosh v. The Great Western Railway Company*, (e) *Cooper v. The Burial Board of Uttoxeter*, (g) *Garrett v. The Banstead and Epsom Downs Railway Company*, (h) *Johnson v. The Shrewsbury and Birmingham Railway Company*, (i) *Horne v. The London and North Western Railway Company*, (k) *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Company*, (l) *Pickering v. The Bishop of Ely*, (m) *Gourlay v. The Duke of Som-*

(a) 1 Giff. 258.

(b) 3 Giff. 70.

(e) 2 Mac. & G. 74 ; 2 De G. & Sm. 758.

(g) 11 L. T. N. S. 565.

(h) *Supra*, p. 462.

(i) 3 De G., M. & G. 914.

(c) 3 De G. & J. 334.

(d) 5 H. L. Cas. 72.

(k) 10 W. R. 170.

(l) 1 H. & M. 468.

(m) 2 Y. & C. C. C. 249.

erset, (a) *Lumley v. Wagner*, (b) *Scott v. Avery*, (c) *Dimsdale v. Robertson*, (d) *Hill v. Barclay*, (e) *Dann v. Spurrier*, (g) *Stubbs v. Lister*, (h) *Eaton v. Lyon*, (i) were referred to. In the view taken by the Court, however, it is unnecessary further to advert to the arguments.

During their progress, however, a question arose as to the admissibility in evidence of an affidavit filed on behalf of the respondents while the motion in the Court below was being opened on behalf of the appellant.

Their Lordships held that, upon an interlocutory motion, counsel were entitled to use any affidavit which was in existence at the time when they were called upon to address the Court, and * 727 that the affidavit was consequently * admissible; (k) but that even if in the Court below its admission or rejection had been in the discretion of the Judge, there could be no objection to its admission upon the appeal.

The Lord Justice KNIGHT BRUCE, after shortly stating the facts and the nature of the appeal to the effect of the statements herein before contained, proceeded as follows:—

The injunction which has been sought interlocutorily only—and necessarily only in an interlocutory shape—is thus:

First, that the company may be restrained by injunction from declaring the contract of the 25th of January, 1864, to be void as to work remaining to be done.

As to that, either the company have, or they have not, a right in law or equity to declare the contract void. If they have not the right, the declaration can be of no avail. It will not assist them in the cause, and the plaintiff would be entitled in the progress of the cause to be relieved against it. If, however, it were quite plain and free from contest that there was no title to declare the contract void on the ground of any default on the part of the

(a) 19 Ves. 429.

(b) 5 De G. & Sm. 485; 1 De G., M. & G. 604.

(c) 5 H. L. Cas. 811.

(g) 7 Ves. 231.

(d) 2 Jo. & Lat. 58.

(h) 1 Y. & C. C. C. 81.

(e) 16 Ves. 402.

(i) 3 Ves. 690.

(k) See *Ex parte Leicester*, 6 Ves. 429, 432.

plaintiff, it might possibly not be wrong, even in this stage of the cause, to issue such an injunction; but, at least, for such a purpose, the case ought to be very clear. In my judgment it is plain, upon the evidence and upon the materials before us, that the case is not sufficiently clear for that purpose. So to deal with it would be to decide at a stage of the cause in which it is improper to decide upon doubtful and insufficient * evidence a question * 728 the decision of which, if the word "decision" may be used by the defendants against the plaintiff, cannot, if they should be wrong, do him any actual damage, because in the progress of the case, at the final hearing of the cause, the matter might be set right, and the company would not be allowed to take advantage of any such wrongful declaration. There is, therefore, no ground in the present case for granting any such injunction. The plaintiff cannot be wronged by refusing such an injunction. The defendants may be wronged by granting it.

Secondly, it is sought to restrain the defendants by injunction from declaring the amount remaining due to the plaintiff for work already done under the contract to be forfeited.

The same observations apply to this branch of the injunction sought as to the former. If the company have no right to make the declaration, it will be of no avail; if they have such a right, the declaration ought to avail. It would be doing more than justice to the plaintiff, and less than justice to the defendants, now to issue an injunction grounded upon a view of the facts which the contest upon the evidence renders in my judgment at present doubtful and improper.

Thirdly, it is sought to restrain the defendants by injunction — and here we must read from the bill and not from the notice of motion, because this, being an interlocutory application, the injunction, if granted, cannot exceed that prayed by the bill (a) — from taking possession of the materials and implements in the plaintiff's possession or belonging to him.

* That is a very wide injunction, but it is possible that, if * 729 the merits of any particular case required it, an injunction in those terms might be granted. But for that purpose, in the present case, it is necessary to recollect what is the state in which these parties now stand with respect to each other.

(a) See acc. *Burdett v. Hay*, *supra*, p. 41.

The avowed object of this branch of the injunction sought is to restrain the defendants from themselves proceeding with the works. But it is a contested point whether the company have or have not a right, in consequence of the conduct of the plaintiff, to proceed with the works. The state of the evidence is obscure and doubtful upon that point. There is a considerable conflict of testimony upon the question whether the company have or have not paid all that the plaintiff has a right to require, and whether there has been a breach of duty on the one side or on the other. But independently of that question of the conflict of evidence, there arises the difficulty which arose in the case of *Johnson v. The Shrewsbury and Birmingham Railway Company*, (a) and other cases of that class; viz., that to proceed upon the notion that the plaintiff has a right to proceed with the works involves a question of specific performance of a contract to do certain works which is more than, according to the course of the Court, and according to reasonable convenience, the plaintiff has a right to require. It is a question of damages. The Court cannot enforce specific performance of the works;¹ it cannot look after the acts and conduct of the plaintiff, nor say how far he does or does not depart from what is right in executing, or professing to execute, the works.

If he is or shall be wronged by his exclusion from the works * 730 and by the act of the company * in executing the works themselves, that will be a case for damages to be assessed and given either in this Court or in a Court of Law, but it is not a case for specific performance or relief analogous to specific performance which an order granting an injunction in the terms of this part of the prayer of the bill would amount to.

In my judgment, therefore, both on the grounds and principles

(a) 3 De G., M. & G. 914.

¹ See 1 Sugden V. & P. (8th Am. ed.) 78, n. (1); Kerr Inj. 494, 495. The Court will not decree specific performance of a contract which it cannot execute in all its material terms: *Gervais v. Edwards*, 2 Dru. & W. 80; *Counter v. Macpherson*, 5 Moo. P. C. 83; *Ford v. Stuart*, 15 Beav. 493; 2 Chitty Contr. (11th Am. ed.) 1467; nor of a contract the consideration of which is the execution of works which the Court cannot superintend. See *Peto v. Brighton, &c., Railway Co.*, 1 H. & M. 468. The specific performance of a contract to make a railway will not be enforced. The remedy is at law. See *Heathcote v. North Staffordshire Railway Co.*, 20 L. J. N. S. 82; *South Wales Railway Co. v. Wythes*, 1 K. & J. 186; 5 De G., M. & G. 880; *Hamilton v. Dunsford*, 6 Ir. Ch. Rep. 412; 2 Chitty Contr. (11th Am. ed.) 1467, and n. (v).

upon which the case which I have just mentioned and others of the same class proceeded, and also having regard to the doubtful and obscure state of the evidence, there has been no title shown at present to an interlocutory injunction. If the plaintiff is right in what he asserts, ample damages will be secured to him by means of this Court, either to be assessed in this Court or in a Court of Law;¹ but there can be no occasion for taking so hazardous a step — a step so contrary to the principles and practice of the Court — as now to proceed on the notion that he should be allowed to execute the works, *nolentibus volentibus* the defendants.

We are told that the defendants are willing to enter into an undertaking not to remove any property belonging to the plaintiff. If that be so, and an undertaking can be carefully worded so as to exclude any doubt or difficulty, I think it may be given; but if it cannot be so worded, after our endeavours shall have been made to do it, the possible inconvenience must be endured.

I do not think the case at present one for an injunction, and I agree, therefore, with the conclusion of the Vice-Chancellor.

THE LORD JUSTICE TURNER. — This case, in my view of it, resolves itself into a single and not a very difficult question, and the argument, * addressed, as it has been, rather to the * 731 question of what should be done at the hearing of the cause than what ought to be done upon the present interlocutory application, ignores to a great extent the distinction between an interlocutory application to the Court and the hearing of the cause.

. There are three points upon which the plaintiff seeks an injunction by his bill, and a fourth upon which he seeks it by his notice of motion.

The first branch of his application seeks an injunction to restrain the defendants from declaring the contract to be void as to work remaining to be done; the second to restrain them from declaring the amount remaining due to the plaintiff for work already done under the contract to be forfeited; the third, which is not in the prayer of the bill, to restrain them from entering upon the line of railway mentioned in the contract; and the fourth, to restrain them from taking possession of any materials and implements in the plaintiff's possession or belonging to him.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1080, and n. (8), 1081; 2 Chitty Contr. (11th Am. ed.) 1420, and n. (b), 1421–1424.

As to the first of these points, namely, the question of an injunction to restrain the defendants from declaring the contract to be void, it is plainly a question for the hearing of the cause and not the subject of an interlocutory application. If, at the hearing of the cause, the Court shall be of opinion that the contract ought not to be declared void, and that the defendants have yet declared it to be void, the sole consequence will be, that the Court will act as if the declaration which has been made by the defendants had not in fact been made. The fact of the declaration having
* 732 been made by them * will in no way alter the case or the position of the plaintiff upon this record.

As to the second point, the question of an injunction to restrain the defendants from declaring the amount remaining due to the plaintiff for work already done under the contract to be forfeited, the same observations apply. Either, in the first place, the defendants are entitled to make the declaration that the amount due has been forfeited, both legally and equitably; or, in the second place, they are not so entitled, either legally or equitably; or, in the third place, they may be entitled to make the declarations legally, but not be entitled to make it equitably. Those are the only possible views which present themselves to my mind of the consequences of the declaration being made. In the first case there can be no possible case for an injunction at the suit of the plaintiff. In the second case, if the declaration be made it will be merely nugatory and of no possible evil. In the third case, if the declaration be made, it will have not the slightest operation in equity at the hearing of this cause, whatever may be its effect at law. If the Court is of opinion that in equity the defendants have no power to make the declaration, the declaration will furnish no sort of defence to them, nor, on the other hand, any sort of obstacle to the plaintiff in obtaining a decree at the hearing of the cause. This, therefore, in my judgment, is quite as much as the first a question for the hearing of the cause.

As to the other two points (if we were to deal with the third point, with which, however, I agree with my learned brother in thinking that we have not properly any thing to do upon the
* 733 present occasion), they are, in * my judgment, simply questions of comparative injury. This Court when called upon to grant an interlocutory injunction will act according to the justice of the case as ascertained upon the evidence before it and

according to the comparative injury which may arise from granting or withholding the injunction.¹ And there is no doubt in my mind upon the evidence before us in which way this question of comparative injury ought to be decided in the present case. It is clear to me upon the evidence that the plaintiff has not proceeded *bonâ fide* and with reasonable diligence with these works.

That being so, what is the consequent position of the company? They are under an obligation to complete the railway. We are told on behalf of the plaintiff that they cannot complete it. But are we to deprive them of the opportunity of trying to complete it? Are we to hold them bound to a contractor who has not, according to the evidence before us, done justice to them in the execution of the works? I see no reasonable prospect of these works being completed if the work be left in the hands of the plaintiff, and I cannot think that this Court would act judiciously in preventing the defendants from taking into their own hands the completion of the works. On the other hand, what is the position of the plaintiff? If he is unduly deprived of the profit of completing these works, and he is right in the bill which he has filed, this Court will have ample means at the hearing of the cause of giving such directions as will set him right in that respect.

It is then said that his plant will be sacrificed,—that his plant is to be taken possession of by the defendants.

The defendants say that they do not mean to take *any * 734 part of his plant; but supposing they did not say so, at least in a case of this description, where the plant forms the substance of the complaint, and where the fact of the plant being intended to be used forms the subject of the complaint, I should have expected to find some evidence as to the extent of this plant; but not only is there no allegation upon this bill of there being any plant belonging to the plaintiff remaining upon the railway, but there is not an affidavit which I have heard read which gives any statement whatever of the nature or quantity of the plant which remains. Besides that, whatever the value or amount of the plaintiff's plant may be which does remain on the railway, the Court will have precisely the same means of setting him right in respect of that plant at the hearing on the cause as it has in the case of any damage which he may sustain by not being allowed to

¹ See *Jacomb v. Knight*, 3 De G., J. & S. 533, 538, note (1), and cases cited.

complete the railway. If the defendants improperly take possession of plant belonging to him, and improperly use that plant for the purposes of the railway, the plaintiff, if he is right in his case, may be entitled to relief in that respect at the hearing of the cause. But it is not, in my judgment, a question which can be dealt with upon interlocutory motion under the circumstances of the present case.

The defendants have stated that they do not intend to take the plant, and express themselves as willing to enter into an undertaking upon the subject. Any such undertaking will require to be carefully framed so as not to give occasion to questions. Probably it should be somewhat of this description; namely, an undertaking not to retain possession of the materials and implements belonging to the plaintiff, not being materials or implements necessary or proper for the construction of the railway. In * 735 that form it will probably do no * harm, otherwise I think that very serious questions may arise.

The appeal will be dismissed. (a)

(a) For a case where a company was, on an interlocutory motion, restrained from removing and selling a contractor's plant and materials pending an arbitration, see *Garrett v. The Salisbury and Dorset Junction Railway Company*, L. R. 2 Eq. 358; and the following report of a subsequent case which came before the Lord Chancellor Lord HATHERLEY may, it is thought, be useful:—

JENNINGS v. THE BRIGHTON INTERCEPTING AND OUTFALL SEWERS BOARD.

THE BRIGHTON INTERCEPTING AND OUTFALL SEWERS BOARD v. JENNINGS.

1872. September 6. Before the Lord Chancellor Lord HATHERLEY.

A contractor agreed with a public board to construct a sewer and other works for them. The specification annexed to the contract empowered the engineer to make alterations in the contract drawings and otherwise, the contractor's remuneration being varied in proportion: provided that all materials delivered for the execution of the works should, on being placed on the works, become the property of the board, but that on completion of the works any unused materials should be removed by the contractor, and upon such removal should revert in and become the property of the contractor; that all temporary buildings and plant provided by the contractor for the construction of the works should, upon being placed on the works, become the property of the board, but subject to the use thereof by the contractor or any other person or persons on his default; and that on completion of the works, they should be removed by the contractor, and upon such removal should revert in and become the property of the contractor; that if the contractor failed in diligently prosecuting the works, the engineer might give him notice of complaint, and if that failed of effect, the board or the engineer might give him seven days' notice pro-

hibiting him at its expiration from further executing the works, and thereupon employ their own workmen or enter into contracts with others to complete the works; and in the event of the board giving such notice, they were to have power to take possession of the temporary buildings and plant then upon the works, and to keep, use, and employ the same in and for the further execution of the works, without being bound to make any compensation for the use or employment thereof, or for the wear or tear or destruction or consumption; any portions unused, unemployed, or unconsumed and remaining in existence to be returned to the contractor, or to be sold by the board, they retaining the proceeds of sale until the final settlement of accounts between them and the contractor.

The drawings annexed to the contract showed a portion of the works to be executed with 9-inch brickwork. The contractor alleged that it was physically impossible to carry this into effect by reason of the influx of water. The engineer alleged that it was perfectly possible, if only proper pumping apparatus were used by the contractor. At the same time he augmented the thickness of the brickwork in part of the works, and the contractor was paid for the additional work as an extra. The contractor, however, allowed the works to come practically to a standstill. The engineer gave him several notices of complaint, and, finally, seven days' notice under the specification for dispossessing him of the works; and on the same day the board obtained an interim order restraining him from removing any temporary buildings or plant. On the day before the expiration of the seven days, an injunction to the like effect was obtained by the board on notice, the contractor, however, not appearing. The seven days having expired, the board issued advertisements for new tenders for the completion of the works, the specification showing expressly that in the parts of the sewer where it was alleged that nine inches thickness of brickwork was insufficient, an augmented thickness would be substituted. The contractor himself tendered without prejudice, but his tender was not accepted. He thereupon gave notices to the new contractors and to the board requiring delivery up to him of all temporary buildings, plant, and materials provided by him for his contract, and filed a bill against the board charging the physical impossibility of completing the original contract with 9-inch brickwork and cement compounded according to the specification; that the contract was a mistake on the part of the engineer, and was accepted by the contractor under a mistake, and that the works to be executed by the new contractors were works of a totally different nature from those which he had agreed to construct, and praying that the contract with himself might be set aside as void, with consequential relief, including delivery up of all materials and plant, or payment of their value; an injunction to restrain the board from using, employing, dealing with or disposing of the materials and plant, or authorizing their use, employment, or disposition, or their being dealt with under the new contract, and from disturbing or interfering with the works, and from instituting any legal proceedings under the contract with himself: *Held*, on an appeal motion for an interlocutory injunction in the terms of the prayer of the bill, and upon an appeal from the order restraining the contractor from removing temporary buildings or plant, —

1. That there was no mistake in the contract, and it could not be set aside on that ground.
2. That the works to be executed under the new contract remained the works to be executed under the old.
3. That in the execution of the works under the new contract, the board and the new contractors had a right to use the temporary buildings, plant, and materials provided by the original contractor.
4. That the board ought not to be required to give any security for the value of the plant and materials.
5. That it was too late for the contractor to appeal from the order awarding the injunction against the removal of temporary buildings and plant after the entrance by the board and the new contractors with his knowledge upon the new contract, which contemplated the use by the new contractors of such temporary buildings and plant.
6. That no interlocutory injunction ought to be granted at the suit of the contractor as prayed by his bill.

7. That although the motion might have been refused with costs, yet inasmuch as one of the Vice-Chancellors had made such costs costs in the cause, such an order was not unreasonable, and would not be disturbed.

THIS was an appeal by Matthew Jennings, the plaintiff in the first and
* 736 defendant in the second of the above-mentioned suits, from * the herein after stated order made in the first suit by the Vice-Chancellor Sir RICHARD MALINS, on the 28th of August, 1872, and from the order also herein after stated made in the second suit by the Master of the Rolls, on the 12th of June, 1872.

The appellant was the contractor with the respondents the Brighton Intercepting and Outfall Sewers Board, for the construction of the sewer and works authorized by their Act, the Brighton Intercepting and Outfall Sewers Act, 1870.

* 737 * The sewer in question was to run along the coast line from Cliftonville on the west to an outfall into the sea at Portobello on the east of Brighton.

The specification annexed to the contract contained amongst others the following clauses, viz. : —

“ 1. General description.

“ It is to be understood that the engineer reserves to himself the right to alter the centre line of the sewers shown on the contract drawing to any extent he may think fit within the limits of deviation shown on the parliamentary plan, and to increase or decrease the depths, levels, and inclinations of the sewers shown on the contract drawings to any extent he may desire, and to omit or abandon any of the works, or to add any others to them, or to make any addition to or deduction from or alteration in them, or in the depths, dimensions, or sizes specified or shown on the contract drawings, and also to alter the materials specified or shown on the contract drawings; and such alterations, if authorized in writing by the engineer, but not otherwise, and which he is to have full power to authorize, shall be made by the contractor, and a proportionate addition to the contract sum or deduction from the contract sum made for the same according to the rates set forth and described in the schedule of prices annexed. But all alterations, additions, or deductions made by the engineer shall not render void or in any respect vitiate the contract. And should any altered or modified work be ordered by the engineer to be executed, for which, in his opinion, no price in the schedule is applicable, the engineer will fix the price for such work, and his decision thereon is to be final and binding on the contractor.

“ 3. Materials to be the Property of the Board.

“ All materials delivered for the execution of the works and placed on the site or sites for the same, or on lands occupied by the contractor in connection with or for the purposes of carrying on the works, shall thereupon become and be the property of the board, subject, nevertheless, to the engineer having the right to reject the same, and such materials shall not be removed from the said site or sites without the previous consent in writing of the engineer; and when the engineer certifies that the said works are fully completed, then all the

materials which shall remain unused shall be forthwith removed from off the said site or sites by the said contractor, and upon such removal the said materials shall revert in and become the property of the said contractor.

“ 4. Plant to be the property of the Board.

“ Until the engineer certifies the final completion of the works, all * temporary buildings or erections, also all wagons, horses, tools, implements, * 738 and plant of every description provided by the contractor for the construction of the works shall, from the time at which they are placed on the site or sites provided for the said works, or on the lands occupied by the contractor in connection with or for the purpose of carrying on the works, become and be the property of the board, but subject to the use thereof by the said contractor or any other person or persons on his default, and shall not be removable from the said site or sites of the said intended works, or from the said lands occupied by the contractor, without the previous consent in writing of the engineer; but whenever the engineer certifies that the said works are finally completed, then upon the completion thereof the said temporary buildings or erections, and all wagons, horses, tools, implements, and plant shall be forthwith removed by the said contractor, and the same shall revert in and become the property of the said contractor.

“ 5. As to the progress of works, non-fulfilment of contract, &c.

“ The works are from the commencement to be proceeded with with such a degree of expedition as in the opinion of the engineer shall be proportionate to the time within which the whole are contracted to be completed; and in case of the contractor not commencing the works at the proper time, or not continuing them with the necessary or proper dispatch, or not providing good and sufficient materials, or not conducting and executing the works to the entire satisfaction of the engineer, then and in any of such cases notice of complaint signed by the engineer will be given to the contractor, and if he does not forthwith proceed in the execution of the works with the expedition required, or does not supply the proper and necessary materials, or amend or renew the work complained of, and thenceforth proceed with the execution of the works in a manner satisfactory to the engineer, the board or the engineer shall have full power, upon giving seven days' notice in writing, to prohibit and prevent the contractor from further executing the whole or any part of the works, and thereupon to employ workmen and others to execute, complete, and uphold the same, or to enter into a contract or contracts with any person or persons to execute, complete, and perform the same at or for such price or prices as may be agreed on between the board and such person or persons. And in case any sum or sums of money which may be due to the contractor by the board, or which may be retained by the board as herein mentioned, being insufficient for defraying the cost and expense of executing, completing, and upholding the works, upon which such other person or persons shall be employed, or in respect of which any such contract or contracts shall be made, and also to meet and discharge the liabilities which shall have been or may be thereafter incurred under this contract by the contractor, or * in case of the board or others to whom the board may be legally * 739 responsible sustaining any loss, damage, or injury from the works not being

completed within the time agreed on, or otherwise from the non-fulfilment of this contract on the part of the contractor, then the contractor shall fully compensate the board or the person or persons so receiving or sustaining loss or damage for the loss, damage, or injury so sustained, or well and effectually indemnify the board against all such loss, damage, or injury; and in the event of the board giving such notice to the contractor, then they shall have the power if they think fit by themselves, their agents, servants, or other persons authorized by them to take possession of and hold all or any part of the said temporary buildings or erections, wagons, horses, tools, implements, plant, and materials which shall have been provided by the contractor, which may then be in or upon or near to the site or sites or intended site or sites of the said works, and to keep, use, and employ the same in and for the further execution of the works or any part thereof until the completion of the said works, or for any less period as the board may think fit, without the board being bound to make any compensation to the contractor for such use or employment thereof, or for the wear or tear or destruction or consumption; but when the said works shall have been completed, or sooner if the board shall think fit, the board shall return to the contractor, or allow him to take possession of and remove and deal with as he may think fit, such or such part or parts of the said temporary buildings or erections, wagons, horses, tools, implements, plant, and materials as shall not have been so used, employed, or consumed, and may remain in existence, or the same or any part thereof may be sold by the board, the board retaining the proceeds of sale until the final settlement between the board and the contractor in respect of the matters and works executed and left unexecuted by him under his contract, with full liberty for the board to apply such proceeds in payment of any sum of money which may be due to them from the contractor under this contract.

“20. Brickwork, &c.

“In measuring the brickwork it is to be understood that work one-half a brick thick is to be reckoned as four and a half inches, one brick thick as nine inches, one brick and a half thick as one foot one and a half inches, two bricks thick as eighteen inches, and so on. The contractors will not be allowed to use bricks which when laid would make work of less thickness.

“23. Mortar.

“The Portland cement mortar is to be composed of—
 “One part of Portland cement.
 “Two parts of sand.”

* 740 * The drawings referred to in the contract and specification showed for part of that portion of the sewer which was to be in tunnelling a thickness of nine inches of brickwork.

When the appellant came to that part of the works, he met with a considerable quantity of water, especially where the sewer was between high and low water mark. This was occasioned, according to the respondents, by the drainage from the Downs to the sea. The appellant on the other hand contended that it

was due to the percolation of the sea-water. And he further contended that 9-inch brickwork was not thick enough to keep out the water, Mr. Hawkshaw, the engineer of the respondents, being on the other hand of opinion that the appellant was not using pumping apparatus adequate to the purpose of keeping out the water. Mr. Hawkshaw, however, as the specification enabled him to do, ordered a portion of the sewer near the outfall at Portobello to be lined with 13½ inch brickwork. The work so ordered was executed by and allowed to the appellant as an extra, although the order authorizing it was not in writing as was contemplated by the first clause of the specification.

The appellant, in May, 1872, allowed the works to come practically to a standstill. According to the respondents this arose from the appellant's want of means. The appellant charged it upon the physical impossibility of going on with the contract as it stood, in regard to thickness of brickwork and composition of cement.

At all events, the engineer, after several previous remonstrances with the appellant on his want of vigour in proceeding with the works, gave him on the 6th of June, 1872, notice under the 5th clause of the specification that at the end of seven days from the service of the notice he should remove him from the further execution of the whole of the works; giving him also notice not to remove any of the temporary buildings or erections, wagons, horses, tools, implements, plant, and materials then in or upon or near to the site or sites or intended site or sites of the said works, but to leave the same where the same respectively then were, in order that the engineer might keep, use, and employ the same in or for the further execution of the works, or any part thereof, in the manner provided by the specification.

Also, inasmuch as it had been discovered that the appellant had already removed some portion of his materials and plant from the works, the respondents on the same 6th of June, 1872, filed their bill in the second of the above-mentioned suits seeking an injunction to restrain the appellant from removing the temporary buildings, erections, wagons, horses, tools, implements, or plant from the works, * and in this suit they on the same day obtained an * 741 interim order, and subsequently on the 12th of June an injunction accordingly.

The order of the 12th of June was made on notice of the motion for it to the appellant, who, however, did not appear, and this order was one of the orders now under appeal.

In pursuance of a resolution passed by them on the 18th of June, 1872, the respondents issued advertisements for new tenders to complete the works, under which the appellant himself tendered under an agreement on the part of the respondents, given at the appellant's request, that his so doing should be without prejudice to any of his rights whatsoever.

The specification referred to in the advertisements was identical with the original specification, except that there was added thereto a notice signed by the engineer calling attention to (amongst other things) "the increase in the thickness of the brickwork of the sewers beyond the shaft No. B*, which is to be a brick and a half thick between this shaft and the Penstock chamber, instead of one brick thick as shown on contract drawings, and two bricks thick as shown

for the whole distance between the Penstock chamber and the outfall," and stipulating that the contractor must include the increase in his tender.

The appellant's tender was not accepted, the respondents giving the preference to that of Messrs. Aird & Son, which was 5000*l.* or thereabouts less than that of the appellant. The appellant thereupon, through his solicitors, served a notice upon Messrs. Aird & Son requiring them not to make use of the appellant's wagons, horses, tools, implements, plant, temporary buildings, and materials provided by the appellant and placed upon the works as contractor, or any of them, or any part thereof, and another notice upon the respondents requiring them forthwith to deliver up to the appellant "all and every the wagons, horses, tools, implements, plant, materials, and temporary buildings which have been provided by him as the contractor for and are now upon the Intercepting Sewers Works between Cliftonville and Portobello, and which are and are claimed by the said Mr. Jennings to be his property, which said plant and materials have been unlawfully taken possession of and are now retained by you."

No notice having been taken of these notices, the appellant, on the 24th of August, 1872, filed his bill in the first of the above-mentioned suits against the respondents as defendants, charging that it was physically impossible to complete the sewers with 9-inch brickwork and cement compounded as in the * 742 specification mentioned; that * the specification and contract drawings were framed by the engineer under a mistake, and that the contract was entered into by the appellant under a mistake; and further, that the works tendered for by Messrs. Aird & Son were works of a totally different nature from the works which the appellant had agreed to construct, and praying (1) A declaration that the appellant's contract with the respondents was void, and that it might be set aside and delivered up to be cancelled; (2) An account of the appellant's outlays in respect of the works with interest; (3) Payment by the respondents to the appellant of the amount found due, and delivery up to him by them of the appellant's materials and plant, or payment to him by them of the value thereof; (4) An injunction to restrain the appellants from using, employing, dealing with or disposing of the materials and plant on the site of the works, or authorizing the same to be used, employed, dealt with, or disposed of under the new contract with Messrs. Aird & Son, or otherwise than to or under the direction of the appellant, and from disturbing or interfering with the works, materials, and plant, except by the direction of the appellant; (5) An injunction to restrain the respondents from instituting any proceedings at law against the appellant in respect of the contract; (6) Damages; (7) Payment by the appellants of all the costs of the suit; and (8) General relief.

On the 28th of August, 1872, the appellant moved in this suit before the Vice-Chancellor Sir RICHARD MALINS for an injunction in the terms of the 4th and 5th paragraphs of the prayer of his bill.

His Honor in giving judgment on this motion remarked upon the conflicting nature of the evidence, but thought that it was at least probable that it was want of means which had pressed upon the appellant and rendered him unable to provide proper pumping apparatus; and that this again had led to the complaints and negligence on the part of the appellant which had resulted in the determination of his contract by the respondents. In that determination the

appellant had acquiesced from May until August. In the meanwhile a new contract with Messrs. Aird & Son had been entered into, the possibility of which was known to the appellant, and which gave them the right which the original specification enabled the respondents to give them of using the appellant's plant and materials for the completion of their contract. The appellant sought an injunction to restrain the exercise of this right. To grant the injunction would probably delay the completion of the work and render the materials and plant of little value to the respondents. If the injunction were refused, the Court could still, at the hearing of the cause, do what was just and award the appellant damages if he were entitled to them. And His Honor thought the injunction ought to be refused. His Honor added, that the present * bill was * 743 founded on the ground of mutual mistake. The fact was not made out, and it was denied on the part of the respondents; but, true or not, it was a novel equity in connection with such a case. His Honor directed the costs of both parties to be costs in the cause, the respondents not pressing for costs.

This was the other of the orders now under appeal; notice of appeal as to both having been given on the 3d of September, 1872.

There was no evidence either on the hearing before the Vice-Chancellor or on the appeal as to the value of the appellant's plant and materials, although the appellant, in an affidavit filed by him on the appeal (but which the respondents alleged that they had had no opportunity of answering), deposed to their existence, and — as to materials — with some particularity; and he further deposed — with a view to the contention raised on his behalf on the appeal, that the respondents should bring a sum of money into Court as a security for the value of this plant and these materials — that he believed that the respondents had raised 85,000*l.* out of the 120,000*l.* they were authorized to borrow; that their new contract with Messrs. Aird & Son was for 58,472*l.*, or thereabouts, besides 29,000*l.* which he alleged to be the value of the work already done by himself, and that he believed that this sum would be largely exceeded; that he believed that the desire of the respondents to confiscate this contract arose from their apprehension that their borrowing powers would not suffice for the completion of the works, and that, unless the Court at once interposed, he would be remediless by reason (among other things) of the deficiency in funds of the board.

Mr. Cole and *Mr. Joseph M. Solomon* appeared for the appellant, and

Mr. Horton Smith, for the respondents. He was not, however, called upon.

The remaining facts in the case, so far as they are material, the nature of the evidence, and the scope of the arguments on the part of the appellant, sufficiently appear from the Lord Chancellor's judgment.

Ranger v. The Great Western Railway Company (a) was referred to.

* THE LORD CHANCELLOR. — This proceeding seems to me to be altogether mistaken, and so little reason have I for thinking that a bill of this kind can succeed on the footing on which it is placed, that I do not think I ought to interfere by way of injunction. * 744

I agree with the learned Vice-Chancellor in saying that there is a misconception in supposing that there is a mistake in the contract, or that it can be set aside on that ground. There is no mistake at all.

The contract is one for the execution of a certain quantity of works in a given manner. It was thought by both sides that the nine inches thick of brickwork would in this particular place be sufficient. But in works of this description it is impossible to be sure. With the most accurate borings and painstaking to ascertain all that can be ascertained, it is impossible to be sure that the work as originally laid out will be executed exactly in the way proposed. During the argument I gave the illustration of a cutting, — an embankment would be the same thing. There may be slips, where there is clay or any material likely to slip. Common prudence therefore imports into the contract a condition that the works shall be of the dimensions specified in the contract, or such other dimensions as the engineer shall specify. And that is the true reading of the contract in the present case. It is a misconception to say, that when the engineer alters the original details, it is an alteration in the contract. The engineer, if he thinks nine inches are not enough, may certify eighteen, and the contractor is to execute at nine inches or so much more as the engineer shall certify. That is the whole contract, and there is no mistake made by anybody about it.

When the case was first opened, I supposed that it might turn out to be of a description, not at all uncommon or undealt with either at law or in equity; namely, that the contractor had entered into a very severe contract by which he could not be paid for any work unless it was certified by the engineer in writing; and that the engineer, being a member of the company or of the board, or from sheer perversity, declined to certify.

The case, however, has not been put upon that footing, but it is said that, if the engineer will not certify for an increase of thickness in the brickwork and an alteration in the composition of the cement, the contract is rendered impossible of performance. It is admitted that there is no perversity on the part of Mr. Hawkshaw, — an imputation, indeed, which, if made, his character would be sufficient to repel. However, so far from a charge of perversity being brought against * 745 him, it is said that he has tried experiments with the result that nine inches of thickness will not do, whilst a thickness of eighteen inches does perfectly well, and one of thirteen and a half does not do so well, although it does better than the thickness of nine inches, which is a failure. It is then said that Mr. Hawkshaw has said that he will see justice done to the contractor, and see him paid for the past, and attend to it, and get the board to come to some arrangement, but that nothing has in fact been done.

I may again remark, in passing, that the case so made has nothing to do with mistake. The contract itself provides for the possibility of its being incapable of completion according to the original ideas by giving the engineer power to certify for an alteration in cases where, in his judgment, the original ideas are advantageously susceptible of modification.

It is possible to conceive that a case, which again, however, is not the case now made before me, and which indeed could not be made in the present frame of the suit, might succeed, — I mean a case of this nature; namely, that the plaintiff was and had been ready and willing to do the work in any possible way under

the contract, but could not go on because the engineer would not certify for any possible way of its performance, and then that the board, taking advantage of the engineer's not certifying, said, "Our engineer shall not certify for you to do it in a reasonable manner, because if he do so we shall have to pay you at the scheduled prices, but we will advertise to see if we cannot get the works done by other parties in a cheaper manner than that in which you have undertaken to do it by your contract." A case of that nature might perhaps be made amounting to what the Court might consider as a fraud on the contract, and a design to escape from its obligations by telling the engineer not to certify, and then by the employers, when that is done and the contractor is forced to throw up the contract, advertising for other tenders to see if the works can be executed more cheaply than they could have been under the contract.

But, as I have said, the present is not that case. What is the position of things here? The plaintiff had a good deal of talk with Mr. Hawkshaw. It appears on the evidence that Mr. Hawkshaw, so far from being unwilling to do what is right and just, was willing to certify for a greater amount than the contract contemplated, and to speak to the board and induce them to accede to his increased certificates, and that he was willing to consider the matter further. But it also appears that Mr. Hawkshaw complained of the plaintiff not going on with the work with proper expedition. This was in May; and assuming (although it is not admitted on the part of the * board) that the plaintiff * 746 thereupon raised the case as to the physical impossibility of going on with the contract as it stood, the nine-inch brickwork and the composition of the cement remaining unaltered, still he allowed the board in June to take the initiative. On the 6th of that month they file their bill to prevent him removing his materials and horses from the works. They get an interim order *ex parte*; that order is, on the 12th, made absolute, they having served a notice on the 6th, telling him that if he did not go on with the works they should, at the end of the seven days, consider the contract at an end.

I asked over and over again during the argument for some evidence of the plaintiff having put himself in the right in the only way in which, as I conceive, he could have put himself in the right. He had received a notice, that on the 13th of June the board would proceed to treat the whole thing as determined. On the 12th of June, before the expiration of that notice, he was enjoined by the Court from removing his materials, and he did not think it necessary to appear upon the motion. The board determined the contract, because the plaintiff did not go on with the works with proper expedition. He says that the board took possession of the works on the 5th. There is some dispute about that; but if they did, there was the more reason why he should bestir himself, and that very quickly. But he did not bestir himself at all. The only course which, as I conceive, he could have taken to set himself right, would have been to say to the board, who were about to dispossess him of the works at the same time that they were endeavouring to force him to perform an impossibility, that he would apply for an injunction to restrain them from ousting him from the works or taking possession of his plant. But he did nothing of the kind. He was informed that they were about to advertise for tenders; he knew that they had got possession of the works, and that they had tied up his hands from removing any thing from

the works; and with all that knowledge he took the course of tendering without prejudice, but he did not take the precaution which was absolutely necessary; namely, that of putting a bill on the file, and writing to the board saying, "My bill is on the file. The tender may be accepted, but I reserve my rights to move for an injunction."

Consider the position in which his conduct has placed the board.

In the first instance, I should have expected to find him, on being served with the notice of the 6th of June (for he was then in the hands of his solicitors), saying to the board, "You are not entitled to put an end to the contract. I only refused to go on with the works because your engineer will not certify what he is bound to certify; namely, that this particular brickwork must be of a
* 747 certain thickness. I am ready * to go on, but until he does that I cannot; and until he does, the contract is unreasonable and vexatious, and I shall take proceedings in equity and prevent you from taking the course you are now taking, because, in fact, the works cannot be finished." Had he done this, how would his case have been strengthened? When the board began advertising for tenders, he would have said, "There is no need for a tender. The work can be done perfectly well if your engineer will make a proper certificate." Still more, when the advertisements came out proposing for the tender that the work should be done at this augmented thickness as regards the bricks, I should have expected to find him saying, not "Let me tender without prejudice," but "Let me tell you, as you are doing the only reasonable thing you ought to have done long ago, if you had offered me what you are offering to the general public; namely, that the work should be done by telling your engineer to certify that as the proper amount, I should have done it."

The matter is really brought to this condition. The board is in possession of the works since June, this person not doing a stroke of work since that time; his plant brought there and ready for service. If the defendants are right—as I think there is strong reason for saying at present, in the absence of any application resting on the want of certificates of the engineer, that they are—in saying, "Here is a man who does not execute the works, and leaves us to take possession of the plant: we must go on with the works under the contract: we have a perfect right to use that plant for the works of the contract, and we shall do so in pursuance of the engagement entered into between our contractor and ourselves; and, our engineer telling us that the brickwork in this particular place will have to be augmented, we shall augment it as much as we think fit, our contract giving us perfect liberty so to do, and we shall be using the plant for the identical contract entered into;" then it is idle to contend that the contract ceases to be the original contract, because the engineer does that which he does under the contract, by virtue of the contract; namely, certify that he means to have the work done in this way and not in that way. That is the power confided to him, and in finishing the work he has a right to the materials.

Then I am asked to discharge the order of the Master of the Rolls.

I must say that it is late to do that, the order having been made so long ago as June last. I do not think that the subsequent proceedings as to the non-prejudice from his tendering for the new contract affect the question whether the contractor ought not to have got rid of the order. But suppose that they did,

still, after contracts are entered into and tenders are made by others upon the faith of having the * available means of the board at their disposal, * 748 can I take away those available means and leave the board and the new contractors in a condition out of which I do not see how I am to extricate them, except at an expenditure of a large sum of money, for repayment of which they would have to rely upon the plaintiff and his sureties? Whereas, on the other side, all that will happen is this; namely, that if the plaintiff can succeed on his bill, which does seem to me very problematical indeed, he will have at the hearing an order for payment of the money.

I see no reason for putting the defendants on terms to give any security. It is like an ordinary money demand made in a suit, in which it is not customary to direct that the parties against whom the money is demanded, and who may be ultimately liable, shall give security for the payment of the demand (a).

I think, regard being had to the whole course of the suit, to the pleadings and to the condition in which the case stands, that the only thing to be done is what the Vice-Chancellor has done; viz., to make no order upon the motion, but to make the costs costs in the cause. It is not unreasonable to make the costs costs in the cause, because ultimately, should any thing come of it, something may be said about the matter having been one in which the plaintiff was justified in making some application to the Court. I do not entertain any such opinion of the case, and I should not have been surprised had the Vice-Chancellor refused the order with costs. However, that is the order, and I think it is a reasonable order.

This appeal must be dismissed with costs.

(a) See *Nerot v. Burnand*, 2 Russ. 56.

[573]

* 749 * In the Matter of The COMPANIES ACT, 1862,

AND

In the Matter of The LIFE ASSOCIATION OF ENGLAND
(LIMITED).

THOMSON'S CASE.

1865. July 6, 7. Before the LORDS JUSTICES.

Upon the formation of a company under the Companies Act, 1862, a person desirous of being appointed one of its local secretaries and agents formally applied for shares. The payments on application and allotment were, by agreement between himself and the company, to be set off against his salary and commission, and no deposit was ever paid by the applicant upon the shares for which he applied. The company, to the knowledge of the applicant, allotted him the shares applied for, and registered him as the holder of them, not, however, appropriating to him any particular shares, but only the amount which he had agreed to take. On the company being afterwards wound up voluntarily, it was *held*, that the applicant was rightly placed upon the list of contributories in respect of the shares applied for, and that the case was unaffected by a cancellation affected to be made by the company of an agreement between themselves and him for his employment as local secretary and agent, which had been in part performed, and the obligations imposed by which on the company and the applicant respectively were not dependent the one upon the other.

Best's Case (2 De G., J. & Sm. 650) distinguished.

THIS was an appeal motion by the liquidators of the Life Association of England (Limited), a company formed and being wound up voluntarily under the Companies Act, 1862, seeking the reversal of an order made by the Master of the Rolls upon an adjourned summons in the winding up, directing the removal of the name of the respondent John Thomson from the list of contributories.

The respondent had upon the formation of the company been desirous of being appointed one of its local secretaries and agents, and, with the futherance of this object in view, had written to the secretary; and inasmuch as the company required its local secretaries and agents to be shareholders, the respondent in his letter to the secretary had expressed his willingness to take twenty shares himself, and to oblige himself to place eighty other shares among his friends within a given time.

* He subsequently, on the 4th of September, 1863, filled * 750 up, signed, and forwarded one of the printed forms issued by the company of application to the directors for an allotment of shares. In this he applied for twenty shares ; stated that he had paid 10*l.* to the company's bankers (that being the amount of 5*s.* on application and a like sum on allotment); agreed, in consideration of such allotment, or any less number of shares the directors might appropriate to him, to pay the calls thereon; and undertook to execute the articles of association when required.

In reply to this application, the secretary wrote to inquire to what bankers the 10*l.* in it expressed to have been paid had in fact been paid, adding, " Or did you forget to omit these words, as with agents and secretaries, if they so prefer, we are satisfied to let their shares be paid out of commission. But if you have paid it, say to what bank, and we shall, when advised, make out your allotment."

The respondent had not, in fact, paid the money, and, in reply to the secretary's inquiries, stated that he meant that it should be set off against his salary and commission.

By an agreement dated the 18th of September, 1863, and made between the company of the one part and the respondent of the other part, the respondent was appointed one of the company's local secretaries and agents, and the company bound itself to pay him a certain salary and certain percentages on business introduced through him or transacted in his district, the company, in case of need, making up the percentages to a minimum of 75*l.* a year; and the respondent bound himself to take twenty shares in the company, and within * twelve months from * 751 the date of the agreement, to place eighty additional shares amongst his friends.

On the following day the respondent was, in reply to an application on his part, informed that the scrip for his shares would be sent to him as soon as his commissions amounted to sufficient to cover the deposit and allotment; viz., 10*s.* per share.

On the 7th of November, 1863, the secretary of the company wrote to the respondent, expressing the dissatisfaction of the board of directors with " the almost entire absence of results of " the respondent's " appointment, and the consequently unsatisfactory nature of the arrangement," and notifying him that unless a very marked change should occur previously, the minimum guar-

anted commission or salary allowed to him by virtue of the existing agreement would be discontinued at the end of the current month. And on the 30th of November, 1863, the directors notified the respondent that his engagement was at an end as from that date.

The appellant, by a letter of the next day, declined to accept the notification of the board, and referred them to the agreement in all its provisions. Some correspondence then took place between the parties, which, however, was made without prejudice and came to nothing. Ultimately, on the 9th of February, 1864, the secretary of the company wrote a letter to the appellant containing the following passages : —

“ In accordance with the application made by you under date of the 4th September last, your name has been entered and appears in our register of members as the holder of twenty shares taken by you as a qualification for the post of our agent at Berwick ; but as you have not yet applied any commission or other
* 752 * money as a payment upon such holding in the capital of this association, we have not hitherto issued your certificate in respect thereof. It is desirable that no further delay should occur in doing this, to prevent a continuance of the present confusion in our books ; and in order that we may now send you the document referred to at once, I shall be glad if you will arrange to make *pro forma* some payment of a merely nominal amount per share, and we will then have the certificate signed and forwarded to you. The whole amount paid on the shares now issued is 17. 10s. each. We do not require, however, that you should pay up this sum in full at once, but I shall be obliged if you will let me hear from you, at your earliest convenience, what sum you will be prepared to remit on this account, so that we may be enabled to arrange the matter finally.”

The appellant, however, made no payment on account as required by this letter, and he never received his scrip.

It appeared that although his name was entered in the register as the holder of twenty shares, no specifically numbered shares were mentioned as belonging to him.

On the 23d of May, 1864, a resolution was come to for the voluntary winding up of the company, and in the winding up the

respondent's name was placed on the list of contributories for twenty shares, and a call was made upon him in respect thereof.

The appellant took out a summons for the removal of his name from the list, the hearing of which was adjourned into Court; and the Master of the Rolls being of opinion that there was not a sufficient contract between the parties, * and that * 753 such contract as there had been had been cancelled, made the order sought.

This was the order under appeal.

Mr. Selwyn and *Mr. W. R. Ellis* appeared for the appellant; and

Mr. Dickinson, for the respondent.

Reference was made to *Sanderson's Case*, (a) *Cookney's Case*, (b) *Felgate's Case*, (c) *Best's Case*, (d) *Bloxam's Case*, (e) The Companies Act, 1862. (g)

The Lord Justice KNIGHT BRUCE said that his judgment, arrived at not without some fluctuation of opinion, was that the present case materially differed from *Best's Case*. (d) Here there existed as facts an application for shares upon the part of the respondent, an accession to that application on the part of the company, and an entry of the respondent's name upon the register of members. In fact, the transaction between the parties seemed to be as complete upon both sides as it was in *Cookney's Case*. (b) The questions before the Court were not questions of account between the parties, but questions of fact, whether or not the respondent's liability on the shares in question had accrued, and, if so, whether it had been discharged; and upon the evidence those questions must be decided against the respondent, and his name must, without prejudice to any pecuniary demand by either party against the other, be restored to the list. In his Lordship's view, the cancellation which it was stated the company had affected to make of the * agreement between the respondent and themselves, * 754 even assuming that that agreement could have been validly

(a) 3 De G. & Sm. 66.

(b) 3 De G. & J. 170.

(c) 2 De G., J. & S. 456.

(d) 2 De G., J. & S. 650.

(e) *Supra*, p. 447.

(g) Sects. 25, 37.

cancelled by the company alone, would have had no effect upon the consequences of the application for shares, or the grant of them, or the consequent registration of the respondent's name.

The Lord Justice TURNER said that his judgment was the same.

The first question was, whether or not there had been an agreement on the part of the respondent that he would, and on the part of the company that he should, become a member of the company as the holder of twenty shares. The respondent denied the existence on the part of the company of any such agreement which he could enforce as against them, and relied upon *Best's Case*. (a) But that case was not an authority in his favour; for there there was an offer indeed to take shares, and a payment of a deposit upon them, evidencing still further the applicant's willingness to accept shares if they should be allotted to him; but nothing on the part of the company, beyond the mere omission to return the deposit, which was not sufficient evidence of any intention on their part to allot, to signify their acceptance of, or their assent to, the offer; whilst here the company had actually made an allotment to the respondent, and entered his name in the register of members: even if it would not have been sufficient to estop them from refusing to make an allotment, had none in fact been made, to say that they had entered into an agreement with the respondent for his salary and commission being set off against the sums payable by him in respect of the shares for which he had applied. The facts of the case, therefore, were, on the first question, against the respondent.

* 755 * But then it was said that there had been a cancellation of the agreement between the respondent and the company. But this could not be, for it was clear upon the evidence that that agreement had been in part performed on the side of the respondent; and even apart from that, the obligations imposed by it upon the respondent and the company respectively were not dependent the one set upon the other.

. There was, in fact, nothing to absolve the respondent from the consequences of having entered into the contract between himself and the company to take shares, and his position was in no way

(a) 2 De G., J. & S. 650.

bettered by the fact of there having been no actual allotment to him of any particular shares. (a) His name must be replaced on the list of contributories, leaving open any claim which he might have against the company, and generally every question of account between the parties: but the case was not one for costs.

The order as drawn up was accordingly expressed to be "without prejudice to any question of account between the said John Thomson and the said company, or to any right which the said John Thomson or the said company may have against each other under the agreement in the affidavit of the said John Thomson, filed the 11th day of April, 1865, mentioned." (b)

* In the Matter of The JOINT-STOCK COMPANIES * 756
ACTS, 1856 and 1857;

AND

In the Matter of The MOSELEY GREEN COAL AND COKE
COMPANY, LIMITED.

BARRETT'S CASE (No. 2).

1864. November 16, 23. 1865. March 25. Before the Lord Chancellor Lord
WESTBURY.

A surety for a debt of a joint-stock company paid the debt after the date of an order for winding up the company under the Joint-stock Companies Acts, 1856 and 1857. Among the securities for the debt in the hands of the creditor was a promissory note of the company: *Held*, that the surety was entitled to set off against a debt due from him to the company an equal amount of the money due from the company on the promissory note.

1865. July 22. Before the Lord Chancellor Lord CRANWORTH.

A contributory of a joint-stock company (which was being wound up under the Acts of 1856 and 1857), in respect of shares purchased in his name by another:

(a) See as to this point, in addition to Cookney's Case, 3 De G. & J. 170, Ind's Case, L. R. 7 C. A. 485.

(b) Reg. Lib. 1865, B. 2125.

Held, not entitled to set off against a demand of the company the amount due from the company upon its promissory notes made in favour of the person who was the real purchaser of the shares, and who had, after the date of the winding-up order, indorsed and deposited the notes with the nominal purchaser's solicitors as an indemnity in respect of his liability on the shares.

THIS was an appeal by Osman Barrett, who, under the decision reported above (a) of the Lord Chancellor, had been settled as a contributory of the Moseley Green Coal and Coke Company, Limited (a company which was being wound up under the above-mentioned Acts in the Court of Bankruptcy), from the refusal of Mr. Commissioner GOULBURN to allow the appellant to set off against the amount of a call of 1000*l.* made against him in the winding up an equal amount of a sum of 7000*l.* due to the appellant upon the promissory note of the company.

In January, 1861, the company had entered into a contract for the purchase of certain mines upon which there was a mortgage of 7000*l.* The appellant was a surety to the mortgagee for the payment of the mortgage money. By a deed between the company and the mortgagor, who was their vendor, the company contracted to pay off the mortgage on May 7th, 1862.

This contract the company failed to perform, and in consequence of that failure the mortgagee required the company to give, and the company did, on the 5th of September, 1862, with the assent of the appellant as surety, accordingly give to the mortgagee their promissory note for 7000*l.*, being the amount due to him, payable in March, 1863.

At the date of the winding-up order in October, 1862, the mortgagee was the *bonâ fide* holder of the note.

On the 23d of February, 1863, the appellant's sister paid off the mortgage, and took from the mortgagee a transfer of his security, and at the same time the promissory note in question was indorsed and delivered over to her. On June 13th, 1864, she agreed with the appellant to transfer the mortgage security to him, and at the same time to hand over to him the promissory note, in consideration of receiving from him his own promissory note. This agreement having been carried into effect, the appellant claimed before the commissioner, and now under appeal, credit for the company's note in his account with them.

(a) Page 416.

Mr. Cole and *Mr. C. T. Swanston* appeared for the appellant; and

Mr. Willcock and *Mr. Roxburgh*, for the official liquidator, in support of the judgment of the Court below.

In the course of the argument, the Joint Stock Companies Amendment Act, 1858 (Stat. 21 & 22 Vict. c. 60, * § 17), the provisions of which are set out below, (a) * 758 — *Hawkins v. Whitten*, (b) *Collins v. Jones*, (c) *Ex parte Stephens*, (d) *Marsh v. Chambers*, (e) *Dickson v. Evans*, (g) *Ex parte Hale*, (h) and *Ex parte Blagden*, (i) — were referred to.

The Lord Chancellor said that one question was, whether the agreement between the appellant and his sister was a dealing and transaction then for the first time created and made, or whether the appellant, in respect of his antecedent suretyship for the 7000*l.* due to the mortgagee, was entitled, by paying off the charges, to claim the benefit of the possession of the mortgagee's securities.

His Lordship was at present disposed to attribute the payment made by the appellant to his sister, the assignee of the mortgage, to that liability to the mortgagee which the appellant had originally contracted as a surety prior to the date of the winding-up order.

His position appeared to his Lordship to be that of a person who, being surety to a creditor of a company prior to the order for winding it up, paid the debt, after that order was made, in respect of that suretyship, * and thereby became entitled to * 759 the benefit of the securities in the hands of the creditor,

(a) "In fixing the amount payable by any contributory, in pursuance of the Joint-stock Companies Acts, or any of them, he shall be debited with the amount of all debts due from him to the company, including the amount of the call, and shall be credited with all sums due to him from the company on any independent contract or dealing between him and the company, and the balance, after making such debit and credit as aforesaid, shall be deemed to be the sum due."

As to the question of set-off in connection with limited companies under the Companies Act, 1862, see *Grissell's Case*, L. R. 1 C. A. 528.

(b) 10 B. & C. 217.

(g) 6 T. R. 57.

(c) 10 B. & C. 777.

(h) 3 Ves. 804.

(d) 11 Ves. 24.

(i) 19 Ves. 465.

(e) 2 Stra. 1234.

among which securities there happened to be a promissory note of the company validly and duly given ; and the question was, whether he was or was not entitled, in respect of the holding or the ownership of that promissory note, to set it off against a demand that might be made against him by the company.

His Lordship at present thought that the appellant's position in this respect was precisely the same as if he had been the holder of the note at the time when the winding-up order was made ; and if the appellant were remitted to that position, his claim to set-off was referrible to a state of things existent at the date of the winding-up order, and not to a state of things arisen out of any contract or dealing which had taken place subsequently to the winding-up order.

His Lordship would hear counsel on this one point when they had had time to look further into the authorities. He decided now that the contract was within the power of the company, and that they had power to give the promissory note : the matter to stand over for a week, and to be then mentioned again.

November 23.

The matter was accordingly on this day again mentioned, and the cases of *Collins v. Jones* (a) and *Ex parte Stephens* (b) were again referred to : and further reference was made to *Dobson v. Lockhart*. (c)

The Lord Chancellor said that the official liquidator could not contend that if the appellant had been the holder of the note
 * 760 at the date of the winding-up * order, he would not have been entitled to set off its amount against the company's claim against him. It would be an injurious thing under a winding-up order, as it had been held to be an injurious thing in bankruptcy, that a debtor to the estate should be permitted subsequently to the winding-up order, or subsequently to a bankruptcy, to purchase up claims upon the estate for the purpose of making a case of set-off ; but the question really was, whether there was not a substantial exception to that principle in a case where, as here, there was an actual ownership of a counter-claim, which, though constituted subsequently to the winding-up order, yet was the

(a) 10 B. & C. 777.

(b) 11 Ves. 24.

(c) 5 T. R. 133.

result of a liability incurred or of a contract entered into antecedently to the bankruptcy or the winding-up order. That distinction was recognized in some of the cases cited, and particularly in *Collins v. Jones*. (a) Then came the material question, did the contract of suretyship entered into, as it had been, by the appellant prior to the date of the winding-up order, with its attendant rights, give such retrospective operation to the appellant's possession and ownership of the note as to entitle him to refer it to that contract? His Lordship's present impression was that it did; and that, as the appellant had got possession of the note as the legitimate consequence of a *bond fide* contract of suretyship made anterior to the winding-up order, he was a *bond fide* possessor of the note, and therefore had the right of set-off against the demand of the company. His Lordship said, that if he retained this impression, what he had said must be taken as the expression of his opinion. If his Lordship changed his view he would hear *Mr. Cole*.

1865. March 25.

On this day the matter was again mentioned, and the Lord Chancellor said that the impression which * he had * 761 previously formed remained unchanged, and directed the order to be drawn up.

July 22.

The order not having yet been finally settled, the appellant now, in pursuance of leave granted for that purpose, moved, before the Lord Chancellor Lord CRANWORTH, that the order made by the Lord Chancellor Lord WESTBURY might be varied by declaring the appellant entitled to set-off against the 1000*l.* call the principal money due on two other promissory notes, each for 500*l.*, instead of that due on the promissory note for 7000*l.*, and that, so far as might be necessary for that purpose, the appeal might be reheard.

As appears by a reference to the report of the case in its earlier stage above, (b) the appellant was a trustee of the shares in respect of which he had been placed on the list of contributories for the vendor of the mines; and this gentleman had, after the date of the winding-up order, deposited the notes now in question with the appellant's solicitors to indemnify the appellant in respect of his liability, if any, on the shares. The notes were those of

(a) 10 B. & C. 777.

(b) *Supra*, p. 416.

the company given against part of the purchase-money to the vendor. They were both dated the 6th of March, 1862, and were made payable at eighteen and twenty-four months after date respectively, and they were both indorsed by the vendor when deposited with the appellant's solicitors.

Mr. Cole and *Mr. C. T. Swanston*, for the appellant, contended that, as the appellant held the 500*l.* notes in respect of a * 762 liability incurred antecedently to the * winding-up order, the case was governed by the Lord Chancellor Lord WESTBURY's decision as to the 7000*l.* promissory note.

Mr. Willcock and *Mr. Roxburgh*, for the official liquidator, contended that it was not; the antecedent liability not having been incurred on behalf of the company as it had been in the other case.

Mr. Cole, in reply, contended that the authorities in bankruptcy as to set-off had no application in a case of winding up.

The authorities referred to were the same as those referred to on the prior hearing.

THE LORD CHANCELLOR (LORD CRANWORTH). — The winding up of a company only takes place when the company has become insolvent, and the principle is the same as that which exists in bankruptcy. What the appellant is here in reality contending for is the right to payment in full, whilst the other creditors of the company have not been paid 5*s.* in the pound.

Lord WESTBURY's decision went upon a principle plainly inapplicable to the case of these notes. In the case before him, the appellant, previously to the date of the winding-up order, was surety for the company, and the Lord Chancellor held that to be the same thing as if the company were indebted to him. Then the company being indebted to the appellant in a sum of 1000*l.*, and the appellant being indebted to the company in a sum of 1000*l.*, the Lord Chancellor, considering that the company was in equity liable to pay the appellant, allowed the set-off.

* 763 * But in respect of the two sums of 500*l.* now in question, there was no debt or liability from the company to

the appellant. The relation of trustee and *cestui que trust* might have existed between the appellant and the company's vendor, but as between the company and the holders of these notes the latter was a complete stranger, and it would be most mischievous if a person were enabled thus to satisfy the demands against him by purchasing up debts due from the company.

So far, therefore, as these two notes are concerned, the appellant in my judgment stands precisely in the situation in which every other creditor stood at the time when the winding-up order was made. I assent to what fell from Lord WESTBURY on the former occasion, but I think that the principle of his decision does not apply to these notes, and I therefore refuse this application, with costs.

The order accordingly, as finally drawn up, declared that the appellant was entitled to set-off against the 1000*l.* mentioned in the commissioner's order an equal amount of 1000*l.* due on the promissory note for 7000*l.* made by the company and dated the 5th of September, 1862, and that to the extent of the sum so set off the mortgage mentioned in the proceedings in these matters was to be deemed satisfied. (a)

* THE MASTER, WARDENS, AND COMMONALTY * 764
OF THE ART AND MYSTERY OF THE CURRIERS
OF THE CITY OF LONDON v. CORBETT.

1865. June 12, 13. August 3. Before the LORDS JUSTICES.

The reversioners in fee of houses on both sides of a court in the city of London sold their reversion of a house on one side of the court to a person who at the same time obtained from the termor an assignment of his interest. The purchaser cleared the site so obtained by him, and on it and on adjoining land commenced building in such a way as to interfere with the access of light and air to the vendors' houses on the opposite side of the court, and the latter filed a bill for an injunction to restrain him from proceeding with or completing his buildings, and for a preventive and mandatory injunction against any building to a greater height than that of the buildings pulled

(a) Reg. Lib. Vol. 20, p. 181.

down, or so as to obstruct the light and air to a greater extent than had been the case prior to the clearance of the site: *Held*, upon the evidence, that there was no such material injury done or occasioned, or likely to be done or occasioned, to the vendors by the acts of the purchaser as would warrant the interference of a Court of Equity, and the bill was dismissed without costs, but without prejudice to any remedy at law.

Per the Lord Justice TURNER: —

The Court of Chancery has never assumed or exercised jurisdiction to order a building, which, so far as it can impede the progress of light and air, has been actually completed, to be pulled down.¹

Whether where, before a bill seeking an injunction by way of preventive remedy is filed, the buildings complained of have been carried to the full height to which it was intended to carry them, the Court would interfere by injunction or give damages under Mr. Rolt's Act (Stat. 25 & 26 Vict. c. 42), *quære*.

As to how far the custom of the city of London as to the access of air remains unaffected by the Prescription Act (Stat. 2 & 3 Will. 4, c. 71, § 3), *quære*.

It is not every impediment to the access of light or air which will warrant the interference of the Court of Chancery by way of injunction, or even entitle the party alleging himself to be injured to damages at law. In order to found a title to relief in equity, or even at law, in respect of such an impediment, some material or substantial injury must be established, and the *onus* of proving the injury rests upon the plaintiff.²

In the case before the Court evidence of an obstruction to the plaintiffs' light and air arising from erections on the site sold by them to the defendant, would have been of no avail to them.

THIS was an appeal by the defendant Charles Joseph Corbett from a decree of the Vice-Chancellor Sir RICHARD TORIN KINDERS-

¹ See *Lawrence v. Austin*, and *Durell v. Pritchard*, 11 Jur. N. S. 576; 34 L. J. Ch. 598; 13 W. R. 981; 1 Joyce Inj. 439. In *Durell v. Pritchard*, L. R. 1 Ch. Ap. 244, on appeal, Lords Justices TURNER and KNIGHT BRUCE *held*, that there is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before filing the bill, and there is no difference in this respect between injury to easements and to other rights; and that the mere fact that the damage created by the obstruction of light is completed before the bill is filed is not of itself a sufficient ground for refusing a mandatory injunction; and that in this, as in any other case of injury to easements, the Court looks to the particular circumstances of each case; but that it will interfere by way of mandatory injunction only in cases where extreme or very serious damage will accrue from non-interference. As to the authority of the Court to grant mandatory injunctions, see *Isenberg v. East India House Estate Co.*, 3 De G., J. & S. 263, n. (1) and cases cited.

² *Jackson v. Duke of Newcastle*, 3 De G., J. & S. 275, and notes (1) and (2); 2 Dan. Ch. Pr. (4th Am. ed.) 1638, and cases cited in note (1); *Robson v. Whittingham*, L. R. 1 Ch. Ap. 442; 12 Jur. N. S. 40; *Clarke v. Clark*, L. R. 1 Ch. Ap. 16.

LEY, whereby his Honor refused to the plaintiffs, the master, wardens, and commonalty of the art and mystery of the curriers of the city of London, who were the respondents upon the appeal, * an injunction in respect of an injury to light and * 765 air, but granted them an inquiry as to damages.

The respondents were entitled to the reversion in fee of two houses, Nos. 1 and 2 on the west side of Helmet Court, in the city of London, expectant on the determination of leases of these houses granted by them.

They were also formerly entitled in fee to a house on the east side of Helmet Court subject to a lease of that house granted by them to one Heathfield Smith ; but in the month of June, 1864, they sold this house to the appellant, and by an indenture dated the 25th of June, 1864, they and their lessee, Heathfield Smith, whose interest the appellant had previously purchased, conveyed and assigned the house to the appellant. The appellant had at this time either purchased the fee or obtained long building leases of the other houses and buildings on the east side of the court.

The passage through the court ran due north and south from Wormwood Street on the north to Peahen Court on the south, and the court was of the width of twelve feet only. The houses and buildings on the east side of the court when purchased by the appellant were of the height of thirty-four feet only above the level of the pavement of the court ; but the appellant, before or soon after he purchased from the respondents the house tenanted by Smith, began to pull down all the buildings on the east side of the court, and to erect along the whole length of the eastern side a new and continuous building.

In the progress of this building it was found that it would exceed in height by sixteen feet the buildings which had before stood upon the site of it, and thereupon * the respondents * 766 filed the bill in this cause, alleging that the proposed building would obstruct the light and air coming to their houses on the west side of the court, and therefore praying that the appellant might be restrained by the order and injunction of the Court from proceeding with or completing the erections and buildings then being erected and built in or along Helmet Court, or any of them, or any part or parts thereof, and also from erecting or building any erections or buildings, erection or building, or permitting any erections or buildings, erection or building, to remain on the site

of the new erections and buildings in or along Helmet Court, or on any part of such site, of any greater height or elevation than the erections and buildings then late standing on the site sold and conveyed by the respondents to the appellant, or so as to obstruct or impede the light and air coming to the remaining property of the respondents on the opposite side of Helmet Court to any further or greater degree or extent than the erections and buildings then late standing on the site sold and conveyed to the appellant, and that the appellant might be ordered to pay the costs of the suit.

Upon the filing of the bill the respondents moved for an injunction, but the motion was ordered to stand until the hearing of the cause, and long before the hearing the appellant had completed the building to the proposed height.

The cause was heard before the Vice-Chancellor Sir RICHARD TORIN KINDERSLEY. There was much evidence on both sides as to the effect produced by the new buildings on the light and air coming to the respondents' houses on the west side of the court, and the conclusion at which his Honor arrived was this; viz.,

that the appellant was entitled to build to any height he
* 767 * might think fit upon the site of the house which he had purchased from the respondents, and that as to the rest of the appellant's buildings the respondents had not made a sufficient case to warrant the Court in ordering any part of them to be pulled down; but his Honor was of opinion that the respondents had incurred material injury by the appellant's buildings, and he accordingly, founding himself, as the Lord Justice TURNER, from whose judgment the present statement of facts is mainly taken, presumed, upon Mr. Rolt's Act (Stat. 25 & 26 Vict. c. 42), made the following decree: "This Court, being of opinion that the plaintiffs have incurred material injury by reason of the interference with the access of light and air to the plaintiffs' premises, Nos. 1 and 2 Helmet Court, occasioned by so much of the buildings erected by the defendant on the east side of the said court as is not erected on the site of the house and premises on the said east side of the said court conveyed to the defendant by the indenture dated the 25th June, 1864, in the plaintiffs' bill mentioned, doth order that an inquiry be made what sum of money should be paid by the defendant to the plaintiffs by way of com-

compensation for damage in respect of such injury," and further consideration was reserved.

The present appeal was from this decree.

The case in the Court below is reported in the 2d volume of Messrs. Drewry and Smale's Reports. (a)

Mr. Baily and *Mr. Sheffield* appeared for the respondents ; and

Mr. Glasse and *Mr. Lindley*, for the appellant.

* The nature of the evidence in the case and the scope of * 768 the arguments on the appeal, during which *Webb v. Bird*, (b) *Johnson v. Wyatt*, (c) *Isenberg v. The East India House Estate Company (Limited)*, (d) *Jackson v. The Duke of Newcastle*, (e) *Martin v. Goble*, (g) *Tapling v. Jones*, (h) *Tenant v. Goldwin*, (i) *White v. Bass*, (k) *Suffield v. Brown*, (l) *Gale on Easements*, (m) and *The Prescription Act*, (n) were cited, sufficiently appear from the judgments of the Lords Justices.

August 3.

THE LORD JUSTICE KNIGHT BRUCE. — In this case I agree with Sir RICHARD TORIN KINDERSLEY that it was right to refuse an injunction and right to refuse an order upon the defendant to take down, remove, or alter any building or work erected or done by him.

But I respectfully differ from that able Judge on the question of the propriety of any interference at all by this Court on behalf of the plaintiffs. The pleadings and evidence do not satisfy me that material injury has been done or occasioned, or that material injury is likely to be done or occasioned, to them by or through the works of the defendant which are the subject of their complaint, or that the dispute ought not to be left wholly and merely to law.

* I think, accordingly, that the bill should be dismissed * 769

(a) Page 355.

(b) 13 C. B. (N. S.) 841.

(c) 2 De G., J. & S. 18.

(d) 3 De G., J. & S. 263.

(e) 3 De G., J. & S. 275.

(g) 1 Camp. 320.

(h) 11 H. L. Cas. 290.

(i) 2 Ld. Raym. 1089, 1093.

(k) 7 H. & N. 722.

(l) *Supra*, p. 185.

(m) Chap. 4.

(n) 2 & 3 Will. 4, c. 71, § 3.

without prejudice to any action which the plaintiffs may be advised to bring.

The Lord Justice TURNER, after stating the facts of the case to the effect of the statement above contained, proceeded as follows:—

It may be right to observe in the outset that, upon the evidence in this case, I am not satisfied that the defendant's buildings had not, before this bill was filed, been carried to the full height to which it was intended to carry them. If the fact be so, I doubt whether any decree ought to have been made in the cause: for, even assuming that this Court has jurisdiction to order a building which, so far as it can impede the progress of light and air, has been actually completed to be pulled down,—a jurisdiction which, so far as I am aware, has never been assumed or exercised,—this bill seeks no more than a preventive remedy, and there can be no case for prevention where what is asked to be prevented has been actually done. Mr. Rolt's Act (*a*) could hardly, I think, be called in aid of such a case.¹ This point, however, was not much, if at all, insisted upon in the argument before us, and I am not disposed, therefore, to rest my decision upon it; although I have thought it right to notice it in order that, if the facts be as I have supposed, the case may not be drawn into a precedent without further consideration.

This point then being laid out of the case, the question is, whether the plaintiffs have established such a case as to warrant the decree made by the Vice-Chancellor.

* 770 * The decree is impeached by the appellant upon two grounds: first, that the buildings erected by him being within the city of London, the plaintiffs can maintain no claim against him by reason of any interference with the access of air to their houses; and secondly, that the defendant's buildings do not interfere with the access of light and air to the plaintiffs' houses to such an extent as materially to injure the plaintiffs.

As to the first point, the defendant relies upon the custom of the city of London, which, although, as he admits, destroyed by the Statute 2 & 3 Will. 4, c. 71, § 3, so far as light is concerned, remains in force, as he insists, so far as it relates to the access of

(*a*) Stat. 25 & 26 Vict. c. 42.

¹ See *Durell v. Pritchard*, L. R. 1 Ch. Ap. 244.

air. This point, however, would only involve a partial alteration of the decree; nor should I be disposed to come to any decision upon it without some evidence, which does not at present exist in the case, as to the custom of the city applying to air as well as to light.

The case must, therefore, in my judgment, be decided on the second point; and upon this my judgment is, that the plaintiffs have failed to establish a case for the interference of this Court.

It is not every impediment to the access of light or air which will warrant the interference of this Court by way of injunction, or even entitle the party alleging himself to be injured to damages at law. In order to found a title to relief in equity, or even at law, in respect of such an impediment, some material or substantial injury must be established, and the *onus* of proving the injury must rest, of course, upon the plaintiff.

In the present case what may be called the scientific *evi- * 771 dence does not, in my judgment, preponderate in favour of the plaintiffs. It is, I think, nearly evenly balanced between the parties, preponderating, if at all, rather in favour of the defendant than in favour of the plaintiffs.

There are many persons in the occupation of different parts of the plaintiffs' houses on the west side of the court, and one only of those persons has come forward to support the plaintiffs' case. It may reasonably be presumed, therefore, that the others of those persons do not consider that they have sustained any material injury; and as to one of them who has made an affidavit on the part of the plaintiff, without meaning to impute to him any intentional misrepresentation, I do not think that his evidence can be relied upon. He does not venture to say from what part of the defendant's buildings the obstruction of which he complains has arisen, whether from the part which is erected on the site of the house formerly tenanted by Heathfield Smith, which is immediately opposite to him, in which case his evidence would be of no avail to the plaintiffs, (a) or from the other parts of the buildings. Nor does he state at what time of the year or at what time of the day he experienced the obstruction to which he refers. It may well be believed that in such a court as this it would be difficult to find sufficient light to work by at all times, or even, per-

(a) See *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093; *White v. Bass*, 7 H. & N. 722.

haps, at any time, in the day in the month of November, the time when the affidavit of this witness was filed ; but it would be difficult, if not impossible, to believe that the witness could, at that season of the year, form any thing like a correct or even an
* 772 approximate * judgment as to the difference in the quantity of light which came into his room before and that which came into his room after the erection of the defendant's buildings.

In my judgment, therefore, the plaintiffs have failed to establish their case, and this bill ought to be dismissed. I should have been prepared to dismiss it absolutely ; but my learned brother thinking that it should be dismissed without prejudice to any remedy at law, I do not object to that limitation ; (a) and upon the whole the bill should, I think, be dismissed without costs.¹

The bill was accordingly dismissed “ without costs, and without prejudice to any action at law which the plaintiffs may bring against the defendant with reference to the matters in question in this suit.” (b)

(a) See *Robson v. Whittingham*, L. R. 1 C. A. 442.

(b) Reg. Lib. 1865, A. 1890.

¹ In *Colcraft v. Thompson*, 35 Beav. 559 ; 15 W. R. 387, the Master of the Rolls, Lord ROMILLY, held that a suit could not be sustained in the Court of Chancery for the purpose of recovering damages for an invasion of ancient lights, when the injunction is refused. See 2 Chitty Contr. (11th Am. ed.) 1420, note (b) ; *Ferson v. Sanger*, Davies's Rep. 252, 261, *per* WARE, J. ; *Milkman v. Ordway*, 106 Mass. 232.

APPENDIX.

* PRIEST v. PERROTT (a).

* 778

1750.

THE bill in this cause was filed in Trinity Term, 1744, by Ann Priest, as plaintiff, against Cassandra Perrott and Martha Perrott, Thomas Perrott, Thomas Powell, and William Dawtrey, as defendants, and its effect was as follows:—

It stated that Henry Perrott, late of, &c., Esq., deceased, being in his lifetime, i.e., on or about the 14th of April, 1735, seised in his demesne as of fee or of some other good estate of inheritance of and in the manor of Barnsley, in the county of Gloucester, with the rights, &c., of the yearly value of 800*l.* and upwards, and being minded to make some provision for the plaintiff, who lived with him as a servant in the capacity of housekeeper, and to whom he was then considerably indebted for arrears of wages, did, in and by his deed-poll, bearing date the said 14th of April, 1735, give and grant unto the plaintiff the sum of 100*l.*, to be paid to the plaintiff within one month after his decease, and also the sum of 40*l.* a year, to be paid to the plaintiff, yearly and every year after his decease during the plaintiff's natural life, at the four most usual feasts, &c., by even and equal portions, the first payment to be made at the feast next after his death; "and did thereby charge all his lands, tenements, and hereditaments lying * and being in Barnsley aforesaid with and for the payment of * 774 the said 100*l.* and the said 40*l.* a year as aforesaid." That Henry Perrott died in the year 173—, leaving Martha Perrott his widow, and Cassandra Perrott and Martha Perrott his daughters and coheirs, having made his will, and that he thereby "gave and devised all his estates whatsoever to his said two daughters, to be divided between them, and charged all his real and personal estate with the payment of his debts, legacies, and funeral expenses, and thereof constituted and appointed the said Martha Perrott, his wife, and Thomas Perrott,

(a) With reference to a question similar to those raised in two of the reports in this series (Reynell v. Sprye, 1 De G., M. & G. 660, and Re London and Eastern Banking Corporation, Longworth's Case, 1 De G., F. & J. 17) as to the cases in which the Court will interfere at the instance of a party to an illegal contract, the reporters had occasion to ascertain the particulars of the above case from the record, to supplement the report, *sub nom.* Priest v. Parrot, in 2 Ves. Sen. 160, which is very meagre even as supplemented by Mr. Belt. Supplement, 330. They have thought that the above extracts may be useful with reference to similar questions.

doctor of law, his brother, executor and executrix, giving them power to sell his real estate, or such part thereof as should be necessary, for payment of his debts." That soon after Henry Perrott's death his widow and Thomas Perrott proved his will and took on themselves the burden and execution thereof, soon after which Martha Perrott died, leaving Thomas Perrott surviving. That Henry Perrott died seised and possessed as well of the said manor and premises at Barnsley as also of divers other manors and hereditaments in the counties of &c., of very great yearly value, and also possessed of a very large personal estate, amounting altogether to 10,000*l*. That immediately after Henry Perrott's death, Cassandra and Martha (his daughters and coheirs), and Martha Perrott, the widow, and Thomas Perrott, as their trustees and guardians, entered into and upon the premises at Barnsley, and ever since had taken the rents thereof for their own use. That the daughters, confederating with Thomas Perrott, who, as surviving executor, had with them entered upon Henry Perrott's personal estate, and also with Thomas Powell and William Dawtrey, who pretended mortgages by Henry Perrott of the Barnsley premises, &c., endeavoured to defeat the plaintiff, &c. That they pretended that the said deed-poll was not duly executed by Henry Perrott; that he was not seised, &c.; that incumbrances had been made on the said premises prior to the plaintiff's charge (whereas, in fact, such charges were made for no consideration, &c.); that Henry Perrott died very much indebted and much more than he left assets to pay, and that he having by his will charged all his real estate with the payment of his debts, the same were a charge on his real estate, and were to be paid before the said sum of 100*l*. and annuity granted to the plaintiff as aforesaid. The plaintiff then charged that there were but few debts, and that the personal estate was sufficient for their payment, or if not, yet the plaintiff insisted that the said sum of 100*l*. and annuity or rent-charge were a specific charge and lien on the said manor and premises at Barnsley, and ought to be paid thereout before any of the debts of the said Henry Perrott, except such as were specifically charged on those premises prior to the said deed-poll therein before mentioned, if such there were; that in case there was any mortgage made by the said Henry Perrott of the said premises at Barnsley, or any part thereof, and even if the same were prior

* 775 to the said deed-poll, yet such mortgage ought to be * paid off and discharged out of other the real estate of the said Henry Perrott, if his personal estate was not sufficient for that purpose, at least so far as to exonerate the plaintiff's said sum of 100*l*. and annuity therefrom, the said Henry Perrott having by his will charged all his real estates with the payment of his debts. The plaintiff then stated that yet nevertheless, on the pretences aforesaid, the said Cassandra and Martha Perrott absolutely refused to pay the plaintiff the said sum of 100*l*. and the said annuity of 40*l*. so granted to the plaintiff out of the estate at Barnsley aforesaid, notwithstanding frequent applications. The bill then submitted that the plaintiff, by reason of the pretended incumbrances on the premises at Barnsley, and having never received any part of her said annuity or rent-charge, could not safely proceed at law for the recovery thereof, but was remediless in the premises at law and only relievable in equity; for in equity she might have discovery, and her witnesses were either dead or abroad: and prayed that the defendants might answer and discover as to Henry Perrott's

will, the claims on the premises at Barnsley, who entered upon his real estates after his death, and who possessed his personal estate, or any part thereof, and to what amount, and to whom and how the same had been paid, applied, and disposed of, and in case there was any mortgage or incumbrance upon the said premises at Barnsley, or any part thereof, which could affect the same prior to the said deed-poll therein before mentioned, that such mortgage or incumbrance might be paid off and discharged out of the said personal estate or out of other the real estate of the said Henry Perrott; and that the said surviving executor might sell so much of the real estate as should be necessary for that purpose, so as to exonerate the plaintiff's said sum of 100*l.* and annuity therefrom; and that the plaintiff might be paid the said sum of 100*l.* so charged on the said premises at Barnsley as aforesaid, with interest for the same from the time the same ought to have been paid as aforesaid, and might also be paid her said annuity of 40*l.* a year charged on the same premises, with the arrears thereof from the death of Henry Perrott; and for further and other relief.

The defendants Cassandra and Martha Perrott, the testator's daughters, with reference to the point upon which the case is reported, viz., the relations between the plaintiff and their late father, by their answer stated that they were informed and believed that "the complainant, being a clergyman's daughter in Barnsley aforesaid, was frequently at the house of the said Henry Perrott as a visitor only for several years in the lifetime of the said Henry Perrott, and was called by the name of Miss Priest, until her frequent visits occasioned observations to be made in the neighbourhood, upon which account the said Henry Perrott ordered his family to call her his housekeeper, under which denomination she continued to live with the said Henry * Perrott for about one year, or some * 776 time longer, but how much defendants cannot say; but during such time complainant did little or no business as a servant or housekeeper, and therefore the said Henry Perrott was not nor could be considerably indebted to her for arrears of wages;" nor did they believe that the said Henry Perrott agreed to pay her wages as a housekeeper; nor did they know or believe that he was indebted to her in any sum of money, or that the deed-poll was executed in consideration of such pretended debt, but they believed "that the said complainant had unlawful commerce with the said Henry Perrott, and lived with him in an indecent and irreputable manner, insomuch that these defendants' mother was obliged to live separate from her said husband, and that in consideration of such unlawful commerce the complainant obtained such deed-poll from the said Henry Perrott." And they submitted that the Court would not assist her, but leave her to her remedy at law. They also stated that Henry Perrott died abroad, and that his will was made abroad.

Thomas Perrott, the surviving executor of the testator's will, by his answer stated, that the complainant lived with the said Henry Perrott for some time, but how long, and whether as housekeeper, or whether he was indebted to her, he did not know; that he believed that the deed under which the complainant claimed was not granted for the consideration of any money paid to or due and owing from the said Henry Perrott, or any other good or valuable consideration whatsoever; but, as he was informed, "was granted upon account of the said Henry Perrott's having unlawful commerce or conversation with the com-

plainant." He then set out accounts of the estate and referred to the existence of a creditor's suit instituted in December, 1742, by one Willett against himself (Thomas Perrott) to administer the testator's estate, and stated that in such suit he had put in an answer. He further stated, that he was willing that the testator's estate should be administered; but he submitted it to the Court whether complainant's demand was of such a nature as deserved the assistance of this Court, and that the bill ought to be dismissed with costs.

He stated also by his answer that Henry Perrott lived at Barnsley, while his wife, who had separated from him, lived in St. George's, Hanover Square.

The defendants Thomas Powell and William Dawtrey were mortgagees on the property sought to be affected by this bill, and set up by their respective answers their respective securities, charging want of notice of the deed under which the plaintiff claimed when they advanced their moneys; and Dawtrey set up also delivery of the title-deeds of the Barnsley estate to him.

* 777 * The case came on for hearing on the 8th of February, 1750.

There are no notes of it in the Hill, Coxe, Melmoth, or other MSS. in Lincoln's Inn Library. The following is the note in the Registrar's Minute-Book, H. T. 24 Geo. 2, 1750 (H. 1750), of the hearing:—

" Priest } p. quer. The end of the bill is to be paid a sum of 100*l*.
 v. }
 Perrott. } and interest, and an annuity of 40*l*. a year.

Hoskyns p. defendants Cassandra and Martha Perrot opens their answer.

Field p. defendant Dr. Thomas Perrott opens his answer.

Probyn p. defendant Powell opens his answer.

Robinson p. defendant Dautrey opens his answer.

Mr. Bathurst, p. quer.

Ent. witn: to deed.

Deed poll, dated the 14th of April, 1735, read.

Edward Harper read.

Stephen Phillips read.

Edward Alden read.

Ent. witn: to plaintiff's character.

Mr. Attorney-General p. defendants Cassandra and Martha Perrot.

Thomas Skylling read.

Anne Trinder read.

Justinian Morse read.

Mary Lock read.

Anne Monger read.

Mr. Solicitor-General p. defendants

Hoskyns.

Mr. Noel p. defendant Powell.

Yorke p. defendant Dr. Perrot.

Mr. Bathurst p. q.

Cur. Dismiss the bill as against the defendants Powell and Bautrety, with costs to be taxed, and as against the other defendants without costs. — ALLEN."

The depositions above referred to the reporters were unable to find.

The following is the decree as entered in Reg. Lib. 1750, B. 280:—

“ This cause coming this present day to be heard and debated before the Right Honorable the Lord High Chancellor, in the presence of counsel learned on both sides, and the pleadings in the cause * being opened: * 778 upon debate of the matter and hearing a deed-poll, dated the 14th of April, 1735, and the proofs taken in this cause read, and what was alleged by counsel on both sides, his Lordship doth order that the plaintiff's bill do stand dismissed out of this Court as against the defendants Thomas Powell and William Dawtreay, with costs to be taxed by Mr. Allen, one of the Masters, and as against the other defendants without costs.” (a)

(a) See, as to the precise point raised in this case, *Spicer v. Hayward*, Prec. in Chanc. 114; *Hunt v. Maunsell*, 1 Dow, 211; *Knye v. Moore*, 1 S. & S. 61; 2 S. & S. 260; S. C. 2 Ves. Sen. Suppt. 330 *sub nom.* *Nye v. Moseley*; *Nye v. Moseley*, 6 B. & C. 133. See, also, where there was no knowledge on the part of the woman that the man was married, *The Lady Cox's Case*, 3 P. Wms. 339.

In the *Portsmouth, Portsea, Gosport, and South Hants Banking Company v. Beldham*, a creditor's suit instituted in June, 1866, by the official liquidator of the bank, which was being wound up under the Companies Act, 1862, to administer the estate of a deceased contributory, and which led to the making of the above extracts, it was sought to make the executors liable at the suit of the bank and other creditors for valuable consideration for moneys paid by the executors out of the estate, upon a bond given by their testator, a married man, to a married woman with whom he had cohabited, each party knowing the position of the other; but the validity of the security was not eventually discussed.

For the case where the woman was the married party, see *Ord v. Blackett*, cited 2 P. Wms. 433; Ca. t. Talb. 154 (if this case is indeed in point); *Matthews v. L—e*, 1 Madd. 558.

See, also, a useful classification of some of the cases on the general question in 13 Jurist, 799; 3 Mac. & G. 100, note (c).

AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ACCOUNT. See **EXECUTOR. PRINCIPAL AND AGENT.**
ACCUMULATION.

The concluding words of the Thellusson Act (40 Geo. 3, c. 98), sect. 1, must be construed to mean "if such excessive accumulation had not been directed."

The Act cannot be applied so as to accelerate the enjoyment of any gift or disposition contained in a will, nor for the purpose of giving to any term or description contained in a will a meaning which it would not have had had the trust for accumulation been good. Although the trust for accumulation is cut down to a limited period, the whole of the rest of the will remains in point of disposition, and of the effect and interpretation of its language, precisely as if there had been no such operation performed by the Act.

Form of order as to costs where on appeal in an administration suit an heir-at-law, upon the construction of the testator's will, succeeded in establishing a right to rents of real estate accumulated under the directions of the will, but in excess of the period for accumulation allowed by the Thellusson Act. — *Green v. Gascoyne*, 565.

See **WILL**, 5.

ACCUMULATIVE GIFT. See **WILL**, 2.

ACKNOWLEDGMENT. See **INSPECTORSHIP DEED**.

* **ACQUIESCENCE.** See **BUILDING SOCIETY**, 2.

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ADVANCEMENT. See **WILL**, 2.

ADVERTISEMENTS. See **SETTLED ESTATES ACT**.

AFFIDAVIT.

It is no objection to the admissibility of an affidavit of a party to a cause, who is a solicitor, that it is sworn before a clerk in the employ of the firm of which such party is a member, such clerk being duly qualified to administer oaths in Chancery, and the firm not being — but the

town agents of the firm, as independent solicitors, being — the solicitors on the record for the deposing party. *Per* the Lord Justice TURNER, affirming the decision of the Vice-Chancellor WOOD, *dissentiente* the Lord Justice KNIGHT BRUCE.

The rule which forbids the admission of affidavits sworn before the solicitors in the cause or any of their clerks should not be extended. *Per* the Lord Justice TURNER. — *Foster v. Harvey*, 59.

See DISCOVERY, 1. INJUNCTION, 2.

AGENT. See PRINCIPAL AND AGENT.

AGREEMENT. See SPECIFIC PERFORMANCE. VENDOR AND PURCHASER.

ALIENATION. See MARRIED WOMAN.

ALLOTTEE. See CONTRIBUTORY, 3.

ALLOWANCE. See TRUSTEE, 1.

ANCIENT LIGHTS. See INJUNCTION, 4.

ANNUITIES. See WILL, 1.

ANNUITY. See INVESTMENT.

ANSWER. See APPEAL, 3.

APPEAL.

1. A petition of appeal by a plaintiff who sued *in forma pauperis* was allowed to be set down, although signed by one counsel only. — *Jones v. Gregory*, 58.

2. Although the Bankrupt Law Consolidation Act, 1849, provided that orders of the Bankruptcy Court should be final unless appealed from within twenty-one days: *Held*, that where that Court acted in winding up a joint-stock company under the Acts of 1856 and 1857, it might rehear and rescind its order settling on the list of contributories a person who was dead at the date of the winding-up order. — *In re The Southampton, &c., Steamboat Company, Limited, Hopkins's Executrix's Case*, 342.

* 781 * 3. Causes being heard on replication, and the bills being dismissed as against one defendant, a codefendant was not allowed to read the dismissed defendant's answer against the plaintiff appealing, but not by his appeal seeking to reverse the dismissal. — *Nesbitt v. Berridge, Butler v. Berridge*, 45.

4. The costs of an unnecessary party to an appeal ordered to be paid by the appellant. — *Scholefield v. Lockwood*, 22.

5. One of the Vice-Chancellors, on the hearing of a cause and cross cause, directed a trial by jury before himself. Neither party requested the adoption of this course, and it was alleged by one of them to be inconvenient: *Held*, to be a matter resting wholly in the discretion of the Court below, and which could not be the subject of an appeal. — *Schneider v. Shrubsole*, 52.

See CHARITY. INJUNCTION, 2.

ARREARS. See INVESTMENT.

ARTICLES. See PARTNERSHIP, 1.

ASSENT. See VENDOR AND PURCHASER.

ATTACHMENT. See WINDING-UP, 2.

AUTHORITY. See PARTNERSHIP, 4.

BANKER. See **PARTNERSHIP**, 4.

BANKRUPTCY. See **FRAUDULENT DEED.** **INSPECTORSHIP DEED.** **INTEREST.** **JURISDICTION**, 1. **ORDER AND DISPOSITION.** **PARTNERSHIP.** **SET-OFF.** **TRADE-MARK**, 3.

BARRISTER. See **FRAUD**, 1.

BLOCKADE.

A joint adventure between the subjects of a neutral power for running a blockade established by one of two foreign belligerents against the ports of the other with a cargo of arms and ammunition is not an unlawful contract, but one from which the ordinary rights of property result.

International law subjects a neutral merchant who transports contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined; but the commerce which was lawful for the neutral with either belligerent country before the war is not made by the war unlawful or capable of being prohibited by both or either of the belligerents.

If a British ship-builder builds a vessel of war in an English port and arms and equips her for war ** bonâ fide* on his own account as an * 782 article of merchandise, and not under or by virtue of any agreement, understanding, or concert with a belligerent power, he may lawfully, if acting *bonâ fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act (59 Geo. 3, c. 69).

The object of a proclamation is to make known the existing law, and it can neither make nor unmake law. — *Ex parte Chavasse, In re Grazebrook*, 655.

BUILDING. See **LEASE**.

BUILDING ACTS.

The 83d section of the 14 Geo. 3, c. 78, is of universal and not of locally circumscribed application, but only applies to insurance moneys upon "houses" and "buildings."

Moneys paid in respect of the insurance of trade fixtures are not within its application. — *Ex parte Gorely, In re Barker*, 477.

BUILDING SOCIETY.

1. The Court of Chancery has jurisdiction to wind up a benefit building society under the Companies Act, 1862.

Per the Lord Justice TURNER: Benefit building societies are quite distinct from friendly and also from industrial or provident societies, and are not affected by the provisions of the statutes regulating the latter two classes of companies.

Circumstances under which a petition of rehearing was received on the signature of one counsel only. — *In re The No. 3 Midland Counties Benefit Building Society*, 468.

2. Property vested in the trustees of a building society was laid out according to a plan, and allotted or sold in lots to members or purchasers,

who were aware of the existence of the plan before the trustees executed conveyances to them, and who entered in the respective conveyances to them into certain restrictive covenants with the trustees of the society, the necessity for the insertion of which was well known to every one having dealings with the society: one of such covenants in particular being to the effect that the restrictive covenants in question should not only enure to the benefit of the persons for the time being entitled under conveyances to be thereafter made by the covenantees, but that the covenantees should be deemed to be trustees of the covenants for the benefit of the persons for the time being claiming under any conveyances already made by the trustees of the society. A bill being filed by a purchaser from an allottee against another person standing, in respect of the society, in a *similar position to himself, as the sole defendant thereto, and seeking to have the benefit of the restrictive covenants entered into by the defendant, and an injunction to restrain him from building in alleged contravention thereof, and a mandatory injunction to compel him to take down buildings already erected by him in alleged contravention thereof, and for damages: *Held*, that the trustees of the society were necessary parties to the suit, and, *semble*, that the other allottees and purchasers ought also to be represented in it.

* 788

Per the Lord Justice KNIGHT BRUCE.

1. Whether the body of restrictive covenants taken together was not of such a character as, independently of delay and of acquiescence, to exclude any remedy by injunction under them: *quære*.
2. It not being possible to sue the defendant at law on the restrictive covenants, it might be the duty of the Court, in the event of the plaintiff having lost his right to an injunction by reason of his delay in instituting the suit, to inquire what, if any, damages he had sustained by the defendant's acts in contravention of the covenants, and to provide for the payment of the amount of them, if any: *semble*.

Per the Lord Justice TURNER.

1. Whether the defendant ought to be bound by the general plan: *quære*.
2. The plaintiff had an equity against the defendant by reason of the particular restrictive covenant above specified, of which breaches of duty on the part of the trustees of the society would not deprive him.
3. That in the particular case the plaintiff had lost his right to an injunction by acquiescence; but, *semble*, that he might be entitled to damages under Sir HUGH CAIRNS's Act, 21 & 22 Vict. c. 27. — *Eastwood v. Lever*, 114.

CALL. See SET-OFF.

CAPITAL. See COMPANY. INVESTMENT.

CHAMPERTY. See FRAUD, 1.

CHARITABLE TRUSTS ACT. See CHARITY.

CHARITY.

The Charitable Trusts Act, 1860, § 8, gives no right of appeal to the Court of Chancery without the authorization of the Attorney-General or of the charity commissioners to two private inhabitants of a parish from an order made by the commissioners in respect of parish charities, the * actual yearly income of which is below 50*l.*; and it makes * 784 no difference that the order sought to be appealed against embraces more than one such charity, and the aggregate yearly income of the whole exceeds 50*l.* — *Ex parte Nicholls, In re The Hackney Charities*, 588.

See WILL, 3.

CHARTER-PARTY. See SHIP.
COMPANY.

The memorandum of association of a limited company formed under the Joint-stock Companies Acts, 1856, 1857, declared the share capital to be so many shares of so much each. The articles of association contained no power to alter the memorandum in this respect, or to authorize the company by resolution to alter the rights of the original shareholders; but provided that the directors might, with the sanction of the company in general meeting, declare a dividend to be paid to the shareholders in proportion to their shares: *Held*, that the company could not, by a special resolution under the Companies Act, 1862, authorize the issue of the unallotted portion of the original share capital with a preferential dividend. — *Hutton v. The Scarborough Cliff Hotel Company, Limited*, 672.

See BUILDING SOCIETY, 1. CONTRIBUTORY.

See DEBENTURE. INJUNCTION, 1, 2. ORDER AND DISPOSITION. SET-OFF.
WINDING-UP.

CONDITIONS OF SALE. See SPECIFIC PERFORMANCE, 2.

CONFIRMATION. See TRUSTEE, 2.

CONSTRUCTION. See ACCUMULATION. BUILDING ACTS. LANDS CLAUSES ACT. LEASE. LUNACY, 1. SETTLEMENT. TRUSTEE ACT. WATER-
WORKS ACT. WILL.

CONSTRUCTIVE TRUST. See FRAUD, 4.

CONTRACTOR. See INJUNCTION, 1, 2, 3.

CONTRIBUTORY.

1. A director of a company applied for and subscribed an agreement to take additional shares. He was entered upon the register in respect of the additional shares, but none were ever actually allotted to him. The company being wound up: *Held*, that his name was properly on the register, and ought also to be placed upon the list of contributors * for such additional shares, notwithstanding his allegation * 785 that he had applied for and subscribed the agreement to take the additional shares as the agent only for another person; there being no evidence that at the time of his application and subscription he had communicated the alleged fact to the company. — *In re The Southampton, &c., Steamboat Company, Limited, Bird's Case*, 200.

2. The memorandum of association of a joint-stock company, registered under the Act of 1856, was signed by A. and B. each for twenty-five shares. A. and B. also each signed the articles of association, which regulated the number of the directors, named certain persons as the first directors, and provided that no person should be eligible as a director unless he should hold in his own right a certain number of shares as a qualification, and then provided that minutes should be made of proceedings of the directors in proper books, and that any such minute, if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, should be receivable in evidence without any further proof.

The minutes of one meeting of the directors, which were signed by A. as chairman, represented A. as a subscriber for 100 shares in the company. A. attended every meeting of the directors as chairman. B. attended one meeting only, whereat the only business transacted was the election of a new director.

The company being ordered to be wound up under the Act of 1862:

Held (affirming the decisions of the Master of the Rolls),—

- (1) That A. was liable to be put on the list of contributories for 100 shares, inasmuch as he was (regard being had to the minutes signed by him) *prima facie* (but, *per* the Lord Justice TURNER, only *prima facie*) liable for that amount, and he had not on the evidence discharged himself from the burden of that liability:
 - (2) That B. was liable to be put on the list for twenty-five shares only, the Lord Justice KNIGHT BRUCE holding his case to be within the principles of *Lord Abercorn's Case* (4 De G., F. & J. 78); and the Lord Justice TURNER distinguishing *Currie's Case* (3 De G., J. & S. 367), and holding that the clause in the articles of association with reference to the qualification, without which persons were not to be eligible as directors, did not apply to persons placed in the position of directors by the articles of association, but only to persons thereafter to be elected directors. — *In re The Llanharry Hematite Iron Ore Company, Limited, Roney's Case, Stock's Case*, 426.
- * 786 * 3. Shares in a limited liability company were applied for, and the applicant gave a check for the amount of the deposit to the secretary of the company, with a stipulation that if the applicant did not get the shares in a few days, the secretary should return him the check or the money. The shares were allotted to the applicant two days afterwards, and his name was entered as that of an allottee in one of the company's books; no issue of the shares, however, or notification of their allotment, was made to him; nor did he pay the additional amount payable on the shares on their allotment. The company being wound up under the Companies Act, 1862:—

Held, by the Lord Justice TURNER, affirming the decision of the Master of the Rolls (*hæsitante* the Lord Justice KNIGHT BRUCE), that the applicant was properly placed on the list of contributories, the contract between the company and the applicant having become perfect and

binding upon the latter when the allotment was made, and notice of the allotment not being necessary to perfect the contract. — *In re The New Theatre Company, Limited, Bloxam's Case*, 447.

4. Shares in a joint-stock company were allotted to and registered in the name of a person on the application in his name of another person to whom the former had lent the use of his name for the purpose, on condition that he was to be exposed to no liability in consequence, and who paid the deposit on the shares. The company being subsequently ordered to be wound up under the Acts of 1856 and 1857, and nothing having been done which could bind the company towards releasing the registered shareholder from his liability: *Held*, that whatever equities in the shape of right to indemnity might exist between him and the person applying in his name and the directors who had entered into an arrangement for his release, which was *ultra vires* and had not been sanctioned by the company, his name was properly placed on the register and list of contributories. — *In re The Moseley Green Coal and Coke Company, Limited, Barrett's Case*, 416.
5. An applicant for shares in a joint-stock company signed a form of acceptance for 200, and gave one of the directors a check for the amount of the first call upon them. Before the check was paid into the company's bankers, the applicant had expressed to the director in question his desire to limit his liability to fifty shares, and the check was paid in with that intention. The bankers' receipt expressed (by accident, as was alleged) a payment in respect of 200 shares. At the next meeting of directors the payment of 500*l.* was agreed to be treated as a payment in full of fifty shares, the remaining amount on the 150 shares for * the present to remain in abeyance, and a certificate of such * 787 fully paid-up shares was delivered to the applicant in exchange for the bankers' receipt, which the applicant accordingly gave up. No certificate or letter of allotment was ever made by, nor was any call ever made upon or dividend paid to, the applicant in respect of the 150 shares: he received a dividend in respect of the fifty shares only. Subsequently, finding his name on the register for 200 shares, he protested, and it was resolved that the 150 shares should be cancelled, as no calls were paid. The company being ordered to be wound up: *Held*, that the applicant was liable as a contributory for fifty shares only. — *In re The Exhall Coal Mining Company, Limited, Miles's Case*, 471.
6. Upon the formation of a company under the Companies Act, 1862, a person desirous of being appointed one of its local secretaries and agents formally applied for shares. The payments on application and allotment were, by agreement between himself and the company, to be set off against his salary and commission, and no deposit was ever paid by the applicant upon the shares for which he applied. The company, to the knowledge of the applicant, allotted him the shares applied for, and registered him as the holder of them, not, however, appropriating to him any particular shares, but only the amount which he had agreed to

take. On the company being afterwards wound up voluntarily, it was *held*, that the applicant was rightly placed upon the list of contributories in respect of the shares applied for, and that the case was unaffected by a cancellation affected to be made by the company of an agreement between themselves and him for his employment as local secretary and agent, which had been in part performed, and the obligations imposed by which on the company and the applicant respectively were not dependent the one upon the other.

Best's Case (2 De G., J. & Sm. 650), distinguished. — *In re The Life Association of England (Limited)*, *Thomson's Case*, 749.

7. The liability of a contributory under the Companies Act, 1862, § 75, commences at the date when he enters into the contract under which he becomes a member of the company which is being wound up. — *Ex parte Canwell*, *In re Vaughan*, 539.
 8. An industrial and provident society originally formed with unlimited liability under the Industrial and Provident Societies Act, 1852, was reregistered with limited liability under the Industrial and Provident Societies Act, 1862, and ordered to be wound up thereunder: *Held*, that past members who had held fully paid-up shares in the society were not liable to * be put on the list of contributories. — *In re The Sheffield and Hallamshire, &c., Society (Limited)*, *Fountain's Case*, *Swift's Case*, 699.
 9. In the winding up of an unregistered company, under the Companies Act, 1862: *Held*, that a person was rightly placed on the list of contributories in respect of shares belonging to him which he, for the purpose of deluding the public into an exaggerated estimate of the number of shareholders in the company, had had registered in the names of mere nominees for him.
- Quære*, whether, regard being had to the 200th section of the Act, the nominees ought not to have been also on the list. — *In re The Wheal Emily Mining Company*, *Cox's Case*, 53.

See SET-OFF. WINDING-UP.

CONVERSION. See FRAUDULENT DEED.

COPYHOLD. See PRESCRIPTION.

COSTS. See ACCUMULATION. APPEAL, 4. EXECUTOR. LANDS CLAUSES ACT. MORTGAGE, 3. TRUSTEE RELIEF ACT.

COUNSEL. See APPEAL, 1. BUILDING SOCIETY, 1.

COVENANTS. See BUILDING SOCIETY, 2. LEASE.

CREDITORS. See FRAUDULENT DEED. WINDING-UP, 2.

CREDITOR'S DEED. See TRADE-MARK, 3.

CUSTODY OF INFANT. See INFANT.

CUSTOM. See INJUNCTION, 4. PRESCRIPTION.

DAMAGES. See BUILDING SOCIETY, 2. INJUNCTION, 1. NUISANCE.

DATE OF ORDER. See APPEAL, 2.

DEBENTURE.

The deed of settlement of a joint-stock company authorized the directors to

borrow at interest on the security of the funds or property of the company moneys not exceeding in amount a moiety of the capital subscribed for at the time of the loan, and to cause the funds or property on the security of which any sum or sums should be borrowed to be respectively assigned, transferred, conveyed, or surrendered, as the case might * require, by way of mortgage to the lender. The * 789 directors having issued a debenture assigning to a lender (who was not a shareholder of the company), as his security, all and singular the capital stock, moneys, securities for money, estate, and effects of the company whatsoever and wheresoever, and whether in hand or afloat, and the company being afterwards wound up: *Held*, —

- (1) That the debenture did not extend to unpaid capital of the company.
 - (2) That he had no priority over the other general creditors of the company.
- *In re The British Provident Life and Fire Assurance Society, Stanley's Case*, 407.

DEBTOR AND CREDITOR. See TRADE-MARK, 3.

DEMURRER.

The principle laid down in *Brownsword v. Edwards* (2 Ves. Sen, 243, 247), that the Court will not determine on demurrer doubtful questions on a legal title, even though its opinion incline in favour of the defendant, but will overrule the demurrer without prejudice to the defendant's insisting upon the same matters by way of answer, is equally applicable to cases where the doubtful question arises on an equitable title. — *Cochrane v. Willis*, 229.

See JURISDICTION, 1.

DIRECTOR. See CONTRIBUTORY, 1, 2.

DISCHARGE. See JOINT TENANTS.

DISCOVERY.

1. The penalty and forfeiture clauses of the Statutes 13 Eliz. c. 5, and 27 Eliz. c. 4, cannot be used by defendants in equity who are parties to deeds which it is sought to impeach under those statutes, as exempting them from giving discovery, or from the necessity of making the common affidavit as to documents, even though among such documents may be the deeds sought to be impeached. — *Bunn v. Bunn*, 316.
2. A person who had acted as the foreman of a manufacturer's business filed his bill against the manufacturer, alleging that under an agreement between them the plaintiff was to have a weekly salary of 30s., and in addition one-sixth of the profits of the business, and praying an account and payment of one-sixth of the profits of the business to him accordingly. The defendant by his answer denied the truth of the plaintiff's case, but admitted a right on his part, under a different agreement, however, to that set up by him, to a weekly salary of 30s. (originally) and to one-twelfth of the profits of the business, coupled, however, with an agreement on the part of the plaintiff that the latter should take the statements of the defendant * as to the profits to be true, and * 790 should not demand or question the business transactions or be entitled to examine or investigate the business books.

The defendant made the usual affidavit as to documents, in which he admitted the possession of documents relating to the matters in the cause, but declined to produce them for the reasons appearing on his answer. *Held*, that he was not compellable to produce them upon an interlocutory application before the hearing, their production not being relevant to the issue whether or not the plaintiff was entitled to a decree for an account, although their production might be material on the question of the amount payable to him if the account were directed. — *Turney v. Bayley*, 332.

DISTRESS. See **WINDING-UP**, 2.

DISTRIBUTION. See **WILL**, 4.

DIVIDEND. See **COMPANY**.

DIVIDEND, REFUNDING. See **INTEREST**.

DOCUMENTS. See **DISCOVERY**.

DOMICILE.

1. A domiciled Scotchman not in the service or employ of the Indian government went to India and resided there for the purposes of his private business, always, however, retaining the wish and intention of returning finally to Scotland: *Held*, that he never lost nor intended to lose his original Scotch domicile.

Per the Lord Justice TURNER: Domicile can only be changed *animo et facto*; and residence alone, although decisive as to the *factum*, is an equivocal act as to the *animus*.

Domicile imports an abiding and permanent home, and not a mere temporary one.

The acquisition of a new domicile involves the abandonment of the previous domicile, and to effect the change the *animus* of abandonment must be shown.

Whether this intention of abandonment may not be inferred from long and continuous residence alone, in a case in which there may be no other circumstances indicative of the intention, *quære*.

The decisions as to the covenanted servants of the East India Company acquiring an Anglo-Indian domicile had no bearing on such a case as that before the Court.

There can be no change of domicile during infancy, and the lapse of seven years after attainment of majority would be too short a time to operate a change of domicile, in the absence of any evidence of an intention to change it. — *Jopp v. Wood*, 616.

* 791 2. A domiciled Englishman, a * widower with six children, went through the ceremony of marriage with his deceased wife's niece in Neuchâtel, in Switzerland, where such a marriage is valid. It appeared, however, that the parties were under the impression that the marriage being good in Switzerland would also be good here. On this occasion a settlement of reversionary personal estate belonging to the husband was executed by him and the lady, the consideration for which was expressed to be the intended marriage, the natural love and affection which the settlor bore for his children by his late wife, and divers other

good considerations, and under which the trustees were to hold the property in trust for the settlor, his executors, administrators, or assigns, until the intended marriage should be solemnized, and afterwards upon trusts for the settlor and his intended wife for their lives, or as to the latter her widowhood, with remainder in trust for such of the settlor's children, whether by his former marriage or by the intended marriage, as being sons should attain twenty-one, or being daughters should attain that age or marry: *Held*, that the word "solemnized," as used in the settlement, meant "validly and effectually solemnized," and that inasmuch as there never had been a valid and effectual solemnization according to English law of the intended marriage, and the settlor was dead, without having changed his domicile, the whole beneficial interest in the property comprised in the settlement was vested in him at the time of his death, and that neither the second wife nor any child of the settlor or of the second wife acquired any interest in such property. — *Chapman v. Bradley*, 71.

DONATIO MORTIS CAUSA. See GIFT.

EASEMENT.

To imply a grant or reservation of an easement as arising upon the disposition of one of two adjoining tenements by the owner of both, where the easement had no legal existence anterior to the unity of possession and is not one of necessity, is a theory in part not required by, and in other part inconsistent with, the principles of English law that regulate the effect and operation of grants of real property.

If the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant; and the operation of a plain grant not pretended to be otherwise than in conformity with the contract between the parties ought not to be limited and cut down by the fiction of an implied reservation.

The grantor cannot derogate from his own absolute grant so as * to * 792 claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor.

The comparison of the disposition of the owner of two tenements to the *destination du père de famille* of the French Code Civil is a fanciful analogy from which rules of law ought not to be derived.

Where the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to any relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership.

Pyer v. Carter, 1 H. & N. 916, not followed.

A dock and an adjoining strip of land and coal wharf were held in fee by the

same person, and whenever a ship of any size was taken into the dock to be repaired her standing bowsprit projected over and across the adjoining strip of land. All the properties were put up for sale by auction under particulars of sale which stated that the dock was capable of holding two vessels of large size, and that at low water several vessels or a steamer of the largest class would safely lie on the ways for repairs; and wherein the strip of land was described as a "freehold coal wharf" capable of being rendered worth a very large rental by a comparatively small outlay; but nothing was stated to show that the dock or its owners either then had or were intended to have any right or privilege over the adjoining premises. The strip of land and coal wharf were sold and conveyed to the purchaser in fee absolutely and in the most unqualified manner, and under such purchaser the defendant claimed. Afterwards the dock was sold and conveyed to the purchaser thereof, under whom the plaintiff claimed. *Held*, on a bill filed for an injunction to restrain the defendant from preventing or interfering with the plaintiff's full use and enjoyment of the dock as the same had theretofore been used by allowing the bowsprit of any vessel in the dock to overlie or overhang the strip of land and coal wharf, and reversing the decision of the Master of the Rolls, that —

- (1) There was no legal ground for holding that the owner of the dock retained or had, in respect of that tenement, any right or easement over the adjoining tenement of the strip of land and wharf after the sale and alienation of the latter:

- * 793 (2) The purchaser or grantee of * the wharf was not to be considered as having been bound to know, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, or as having bought with notice of this necessary use of the dock, and the absolute sale and conveyance to him was not to be cut down or reduced accordingly:

- (3) The easement claimed by the plaintiff was neither "continuous," "apparent," nor "necessary."

As to what might have resulted had the dock been the property first sold, and had it been conveyed with all privileges, easements, rights, and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal wharf, *quære*. — *Suffield v. Brown*, 185.

See INJUNCTION, 4.

ECCLESIASTICAL PERSONS. See PRESCRIPTION.

EQUITABLE ASSIGNMENT. See MORTGAGE, 4.

EQUITY. See JURISDICTION, 2.

EQUITY OF REDEMPTION. See UNDERVALUE.

EVIDENCE. See APPEAL, 3.

EXECUTION. See MARRIED WOMAN. WINDING-UP.

EXECUTOR.

An executor who has not proved his testator's will may be made a party to a

suit, provided he has acted as executor, and it is not necessary, in order to maintain the bill against him, to prove that he has actually received money in the character of an executor.

Circumstances under which a person named as an executor in a will was held to have so acted as to render himself liable to account as an executor and pay costs as having joined in a vexatious defence. — *Vickers v. Bell*, 274.

See TRUSTEE.

EXONERATION. See MORTGAGE, 8.

FALSE REPRESENTATION. See TRADE-MARK, 1.

FEME COVERT. See MARRIED WOMAN. SETTLEMENT, 2.

FORECLOSURE. See MORTGAGE, 2.

FOREIGN ENLISTMENT ACT. See BLOCKADE.

FORGERY. See MORTGAGE, 1.

* FRAUD.

* 794

1. Where a client, two months after protracted and complicated litigation with reference to the ownership of an estate of considerable value had been brought to a successful issue under the guidance of a barrister, executed in favour of the latter a grant of the reversion in the estate expectant on the client's own death, charged with the client's debts and legacies to a specified amount: *Held*, that the deed must be set aside, whether as a deed of a gift, or as a contract, the evidence showing undue influence over, and want of independent advice on the part of, the client.

Quære, whether the deed would not be bad on the grounds of champerty and maintenance. *Per* the Lord Justice KNIGHT BRUCE. — *Broun v. Kennedy*, 217.

2. A small freehold property was agreed to be sold by an elderly spinster in humble life, to a person far above her in station. The agreement was come to between the parties alone. In respect of the consideration the vendor sought and obtained a slight advance on that offered by the purchaser. The purchaser's solicitor drew the conveyance, and it was presented to the vendor ready for execution, and executed by her without any advice. The Master of the Rolls having set aside the conveyance: *Held*, that his decree was right, because —

Per the Lord Justice KNIGHT BRUCE: The parties to the contract were in such relative positions that (a case of undervalue being on the evidence affirmatively deposed to) it lay on the purchaser (contrary to the usual rule) to show affirmatively that the price he had given was the value, and on the evidence he had failed in doing so.

Per the Lord Justice TURNER: There was such a difference between the position of the parties to the contract as rendered it incumbent on the purchaser to throw further protection round the vendor before he made the bargain with her, and the contract was an improvident one from

which she was entitled to be relieved (approving and following *Evans v. Llewellyn*, 1 Cox, 333).

Per the Lord Justice KNIGHT BRUCE: The circumstance standing alone of the vendor being acquainted with the value of the property might amount to nothing or next to nothing.

Per the Lord Justice TURNER: In ascertaining, in a case of disputed sale, the value of land with dilapidated cottages on it, the rent which the cottages would produce is not the only element to be considered; the value of the site at the time of the sale must also be considered. — *Baker v. Monk*, 388.

3. A life assurance society reassured a portion of its risk on one of its policies with a second society, stating that a third society had
- * 795 * reassured part of the risk, and that the remainder beyond what it was proposed that the second society should take would be retained by itself, the first society. This was the intention of the first society at the time, but in the interval between the proposal to the second society and the completion of the reinsurance with it, the first society, for reasons connected with its own business, but without the intervention of any new fact, or new information, or change of opinion as to the value of the life ultimately assured, changed its prior intention and reassured the whole of the risk beyond what was to be taken by the second society with the third society. The first society, however, did not communicate its change of intention to the second society, but allowed them to complete their reinsurance. The life having dropped, and the risk having become a claim, and the second society having learnt the above facts, and having declined to pay the amount of their own reinsurance, the first society brought an action at law against them on the policy. Upon a bill filed by the second society against the first, alleging, as by evidence was proved to be the fact, that the retention by the first society of a portion of the risk was a material element in inducing the second society to take a share in it without further investigation than they actually made, and praying to have it declared that the policy had been “fraudulently” obtained, and ought to be delivered up to be cancelled, and seeking an injunction to restrain the action and any other proceedings: *Held*, —
- (1) That the second society was entitled to the relief it sought.
 - (2) That the case made by the bill was one for equitable relief, and that there was consequently jurisdiction in equity to deal with it, even if it might have been dealt with at law also.
 - (3) That the word “fraudulently” in the prayer of the bill was properly used in its technical sense, and that consequently failure of proof of fraud in fact was immaterial.
 - (4) That even although where a bill alleges a case of fraud only, and the fraud is not proved, the bill will be dismissed; yet if the case alleged is not one of fraud only, relief may be given on the alternative case made by the bill. Observations on *Wilde v. Gibson* (1 H. L. Cas. 605) on this head.

Per the Lord Justice TURNER. — If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation * is made, it is the imperative duty of the * 796 party who had made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances: and the Court will not hold the party to whom the representation has been made bound unless such communication has been made. — *Traill v. Baring*, 318.

4. A fraudulent abstraction of trust property by the trustee and a fraudulent receipt and appropriation of it by another person for his own personal benefit place the receiver in the same situation as the trustee from whom he received it, and he becomes subject in a Court of Equity to the same rights and remedies as may be enforced by the parties beneficially entitled against the fraudulent trustee himself; and when it is said that the person who receives under such circumstances is converted by the Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust.

But the relief against the receiver in such cases is founded on fraud and not on constructive trust, and therefore the right of the party defrauded is not affected by lapse of time, or, generally speaking, by any thing done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud that has been committed. — *Rolfe v. Gregory*, 576.

See PARTNERSHIP, 4. SETTLEMENT, 2. TRADE-MARK, 2. UNDERVALUE. FRAUDS, STATUTE OF. See SPECIFIC PERFORMANCE, 1. FRAUDULENT DEED.

A partnership of two was dissolved, the outgoing partner assigning to the continuing partner all his share in the partnership assets, and the latter covenanting to pay the partnership debts. At the date of the assignment the firm was insolvent, as was also each of the partners. The firm being shortly afterwards adjudged bankrupt: *Held*, that the transaction was void; that it did not operate as a conversion of the outgoing partner's property into the separate estate of the continuing partner; and that the whole of the property as it existed belonging to the bankrupts at the date of the assignment must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors. — *Ex parte Mayou, In re Edwards-Wood*, 664.

See DISCOVERY, 1.

* FUTURE PROPERTY. See MORTGAGE, 4.

* 797

GIFT.

A., the payee of certain promissory notes, who was upwards of seventy-nine years of age, brought them to his nephew B., saying, "I give you these notes," adding that B. should have them at A.'s death, but that the latter would like to be master of them as long as he lived. The notes not being indorsed were then indorsed by A. in the presence of one witness in the following way: "I bequeath—pay the within contents to B. or his order at my death." Six months afterwards the testator died, and in a suit to administer his estate: *Held*, that B. had no right to the notes or the moneys thereby secured; the evidence showing that the transaction amounted to no more than an attempted testamentary gift, which failed. — *In re Patterson's Estate, Mitchell v. Smith*, 422.

GOOD-WILL. See TRADE-MARK, 2.

GUARDIAN. See INFANT.

HUSBAND AND WIFE. See INFANT, 1. MARRIED WOMAN. MORTGAGE, 3. SETTLEMENT, 2.

IGNORANCE. See FRAUD, 2.

ILLEGAL DEALING. See BLOCKADE.

ILLEGITIMATE CHILD. See SETTLEMENT, 3.

INCOME. See INVESTMENT.

INCORPORATION OF LANDS CLAUSES ACT. See LANDS CLAUSES ACT.

INCUMBRANCERS. See MORTGAGE, 1, 4.

INFANT.

1. A husband, who had indecently conducted himself towards an infant female child of the marriage, and separated from his wife in consequence, covenanted in the separation deed that the children of the marriage (who were infants) should at all times thereafter be under the sole care, management, and protection of the wife: *Held* (by the Lord Justice TURNER, affirming the decision of the Master of the Rolls, but *dissentiente* the Lord Justice KNIGHT BRUCE), that the covenant was not contrary to public policy, and was enforceable in equity at the suit of the wife; but *held*, also (by the Lords Justices), that an injunction consequently granted against the husband to restrain him from
 * 798 * proceeding to obtain the infant children from the custody of the wife should not be a perpetual injunction, but one until further order only.

Per the Lord Justice KNIGHT BRUCE: The fact of the particular covenant being contrary to public policy did not vitiate the rest of the deed.

Per the Lord Justice TURNER: Whether the covenant being treated as not contrary to public policy would have been enforced at the suit of the wife had she also been guilty of misconduct. — *Swift v. Swift*, 710.

2. The father of an infant of nearly three years old, originally a Protestant, had died a Roman Catholic and intestate. His widow married again. The Court committed the guardianship and custody of the child, until it should attain the age of seven years, to the mother, her second husband, and her brother-in-law, all Protestants, deeming it requisite, in consequence of the child's tender age and delicate health, that it should continue under its mother's care, with persons associated with her; but the Court declared that, under the circumstances of the case, the child ought to be brought up in and educated, when capable of receiving religious education, as a member of the Roman Catholic Church; and directed that when she attained the age of seven years application should be made to the Court respecting her guardianship and education and religious instruction. — *Austin v. Austin, In re Austin*, 716.

See DOMICILE, 1.

INFLUENCE. See FRAUD, 1.

INJUNCTION.

1. By a contract between a contractor and a railway company, under which the former was to execute the company's works, it was provided (amongst other things) that surplus chalk should be the contractor's property, and that if the contractor should in the judgment of the company's engineer fail in the due performance of the contract, the engineer might, by order of the board of directors, take the further performance of the contract out of the contractor's hands, and employ for the purposes of the contract such persons and on such terms and conditions as the engineer should think fit. In alleged exercise of the power conferred by the latter provision the company resumed possession, and took the further performance of the contract out of the contractor's hands, who thereupon filed a bill for an injunction, alleging impropriety of conduct and duress on the part of the engineer, and that the chalk taken would, upon the completion of the works, become the plaintiff's property as surplus, — allegations the truth of which were *bond fide* disputed by the company: *Held*, that the * contract * 799 being one where, if the company was wrong, the contractor could be amply compensated in damages, whereas if the contractor were allowed to resume work, the Court could not enforce specific performance of the contract in order to compel the completion of the works, the contractor was not entitled to an interlocutory injunction. — *Garrett v. The Banstead and Epsom Downs Railway Company*, 462.
2. Disputes arose between a contractor for the construction of a railway and the company for whom the railway was to be constructed as to the time which the works done had taken for their execution; as to the probable time within which the railway could be finished; and as to defaults in the execution of works, and in payment, which were alleged on the one side and denied on the other, and as to which there was a considerable conflict of evidence. The contract and specification provided, amongst other things, that if the contractor failed to proceed with the works in

the manner and at the rate of progress required by the company's engineer, the contract should be, at the option of the company, but not otherwise, considered void so far as related to the work remaining to be done, and that all sums of money which might be due to the contractor, together with the materials and implements in his possession, and all sums of money named as penalties, for the non-fulfilment of the contract, should be forfeited to the company and the amount considered as ascertained damages for breach of contract. The company, seeking to avail themselves of these provisions in the contract on the ground of alleged default on the part of the contractor, claimed the right of completing the works themselves. The contractor thereupon filed a bill against them, seeking an injunction to restrain them from declaring the contract void as to work remaining to be done, and from declaring the amount remaining due to him for work already done under the contract forfeited, and from taking possession of the materials and implements in his possession or belonging to him. He then moved interlocutorily for an injunction in the terms of the prayer of his bill, and also for an injunction to restrain the company from entering upon the line of railway mentioned in the contract: *Held*, that, —

- (1) The case was not one for an interlocutory injunction.
- (2) An injunction granted upon an interlocutory application cannot exceed that prayed by the bill.

Upon an interlocutory motion, counsel are entitled to use any affidavit which is in existence at the time when they are called upon to address the Court. — *Munro v. The Wivenhoe and *Brightlingsea Railway Company*, 723.

3. A contractor agreed with a public board to construct a sewer and other works for them. The specification annexed to the contract empowered the engineer to make alterations in the contract drawings and otherwise, the contractor's remuneration being varied in proportion: provided that all materials delivered for the execution of the works should, on being placed on the works, become the property of the board, but that on completion of the works any unused materials should be removed by the contractor, and upon such removal should revert in and become the property of the contractor; that all temporary buildings and plant provided by the contractor for the construction of the works should, upon being placed on the works, become the property of the board, but subject to the use thereof by the contractor or any other person or persons on his default; and that, on completion of the works, they should be removed by the contractor, and upon such removal should revert in and become the property of the contractor; that if the contractor failed in diligently prosecuting the works, the engineer might give him notice of complaint, and if that failed of effect, the board or the engineer might give him seven days' notice prohibiting him at its expiration from further executing the works, and thereupon employ their own workmen or enter into contracts with others to complete the works; and in the event of the board giving such notice, they were to

have power to take possession of the temporary buildings and plant then upon the works, and to keep, use, and employ the same in and for the further execution of the works without being bound to make any compensation for the use or employment thereof, or for the wear or tear or destruction or consumption; any portions unused, unemployed, or unconsumed and remaining in existence to be returned to the contractor or to be sold by the board, they retaining the proceeds of sale until the final settlement of accounts between them and the contractor.

The drawings annexed to the contract showed a portion of the works to be executed with 9-inch brickwork. The contractor alleged that it was physically impossible to carry this into effect by reason of the influx of water. The engineer alleged that it was perfectly possible, if only proper pumping apparatus were used by the contractor. At the same time he augmented the thickness of the brickwork in part of the works, and the contractor was paid for the additional work as an extra. The contractor, however, allowed the works to come practically to a standstill. The engineer gave him several notices of complaint, * and, finally, a seven days' notice under the specification for dis- * 801 possessing him of the works; and on the same day the board obtained an interim order restraining him from removing any temporary buildings or plant. On the day before the expiration of the seven days, an injunction to the like effect was obtained by the board on notice, the contractor, however, not appearing. The seven days having expired, the board issued advertisements for new tenders for the completion of the works, the specification showing expressly that in the parts of the sewer, where it was alleged that nine inches thickness of brickwork was insufficient, an augmented thickness would be substituted. The contractor himself tendered without prejudice, but his tender was not accepted. He thereupon gave notices to the new contractors and to the board requiring delivery up to him of all temporary buildings, plant, and materials provided by him for his contract, and filed a bill against the board charging the physical impossibility of completing the original contract with 9-inch brickwork and cement compounded according to the specification; that the contract was a mistake on the part of the engineer and was accepted by the contractor under a mistake, and that the works to be executed by the new contractors were works of a totally different nature from those which he had agreed to construct, and praying that the contract with himself might be set aside as void, with consequential relief, including delivery up of all materials and plant, or payment of their value; an injunction to restrain the board from using, employing, dealing with, or disposing of the materials and plant, or authorizing their use, employment, or disposition, or their being dealt with under the new contract, and from disturbing or interfering with the works, and from instituting any legal proceedings under the contract with himself: *Held*, on an appeal motion for an interlocutory injunction in the terms of the prayer of the bill, and upon an appeal from the order restraining the contractor from removing temporary buildings or plant, —

- (1) That there was no mistake in the contract, and it could not be set aside on that ground.
- (2) That the works to be executed under the new contract remained the works to be executed under the old.
- (3) That in the execution of the works under the new contract, the board and the new contractors had a right to use the temporary buildings, plant, and materials provided by the original contractor.
- (4) That the board ought not to be required to give any security for the value of the plant and materials.
- * 802 (5) * That it was too late for the contractor to appeal from the order awarding the injunction against the removal of temporary buildings and plant after the entrance by the board and the new contractors with his knowledge upon the new contract, which contemplated the use by the new contractors of such temporary buildings and plant.
- (6) That no interlocutory injunction ought to be granted at the suit of the contractor as prayed by his bill.
- (7) That although the motion might have been refused with costs, yet inasmuch as one of the Vice-Chancellors had made such costs costs in the cause, such an order was not unreasonable, and would not be disturbed.
— *Jennings v. The Brighton, &c., Sewers Board*, 735.
4. The reversioners in fee of houses on both sides of a court in the city of London sold their reversion of a house on one side of the court to a person who at the same time obtained from the termor an assignment of his interest. The purchaser cleared the site so obtained by him, and on it and on adjoining land commenced building in such a way as to interfere with the access of light and air to the vendor's houses on the opposite side of the court, and the latter filed a bill for an injunction to restrain him from proceeding with or completing his buildings, and for a preventive and mandatory injunction against any building to a greater height than that of the buildings pulled down, or so as to obstruct the light and air to a greater extent than had been the case prior to the clearance of the site: *Held*, upon the evidence, that there was no such material injury done or occasioned, or likely to be done or occasioned, to the vendors by the acts of the purchaser as would warrant the interference of a Court of Equity, and the bill was dismissed without costs, but without prejudice to any remedy at law.

Per the Lord Justice TURNER: —

The Court of Chancery has never assumed or exercised jurisdiction to order a building, which, so far as it can impede the progress of light and air, has been actually completed, to be pulled down.

Whether where, before a bill seeking an injunction by way of preventive remedy is filed, the buildings complained of have been carried to the full height to which it was intended to carry them, the Court would interfere by injunction or give damages under Mr. Rolt's Act (Stat. 25 & 26 Vict. c. 42), *quære*.

As to how far the custom of the city of London as to the access of air remains unaffected by the Prescription Act (Stat. 2 & 3 Will. 4. c. 71, § 3), *quære*.

It is not every impediment to the access of light or air which * will * 803 warrant the interference of the Court of Chancery by way of injunction or even entitle the party alleging himself to be injured to damages at law. In order to found a title to relief in equity, or even at law, in respect of such an impediment, some material or substantial injury must be established, and the *onus* of proving the injury rests upon the plaintiff.

In the case before the Court evidence of an obstruction to the plaintiffs' light and air arising from erections on the site sold by them to the defendant, would have been of no avail to them. — *The Carriers Company v. Corbett*, 764.

5. It is irregular for the Court, upon a defendant's motion to dissolve an injunction obtained against him *ex parte*, to grant any new injunction, and especially so if the new injunction is not granted, in the terms of the prayer of the bill. — *Burdett v. Hay*, 41.

See BUILDING SOCIETY, 2. COMPANY. FRAUD, 3. LEASE. NUISANCE. SHIP. TRADE-MARK, 1, 4. WINDING-UP, 1.

INSOLVENT. See JURISDICTION, 1.

INSPECTORSHIP DEED.

A debtor executed a deed of inspectorship, which was intended to operate under the Bankruptcy Act, 1861, § 192, and which provided for payment of the debts by instalments, and the avoidance of the deed in certain contingencies, one of which happened, and for the revivor of the debts in that event, deducting dividends received under the deed. A certain creditor was mentioned as such in one of the schedules to the deed. The debt of this creditor was also mentioned in the statutory account of debts of the debtor, which was verified by his affidavit; and the creditor received a dividend on his debt from the inspectors under the inspectorship: *Held*, that the debt, being otherwise barred by the Statute of Limitations, was not by any of these circumstances taken out of the operation of the statute. — *Ex parte Topping, In re Levey*, 551.

INSPECTORSHIP OF PROCEEDINGS. See LUNACY, 3.

INTEREST.

The language of the orders of the Court of Bankruptcy must be construed with reference to the settled rules of the Court; and it being the settled practice of the Court, that where a security consists of an equitable mortgage, and the mortgagee after a bankruptcy presents a petition for the realization of the security, he is not entitled to any interest subsequent * to the date of the *fiat*: *Held*, that where securities * 804 by way of equitable mortgage comprised joint property of bankrupt partners, separate property of one partner and property of a stranger, and the mortgagees being joint and separate creditors elected to prove against the separate estates, an order made on their petition, and directing an account of principal and interest due to them without express limitation of the calculation of the interest to interest due at the date of the *fiat*, did not entitle them to a calculation of, or to retain

out of the proceeds of the securities, interest subsequent to the date of the *fiat*.

Dividends paid upon an erroneous principle ordered to be refunded after a considerable lapse of time and change of circumstances. — *Ex parte Lubbock, In re Flood and Lott*, 516.

INVESTMENT.

An intended husband, by his marriage settlement and under a power enabling him, appointed certain freeholds, of which he was tenant for life in possession, to trustees during his intended wife's life upon trust out of the rents and profits to pay her an annuity of 500*l.* for her jointure in lieu of dower, and gave her the usual powers of distress and entry for securing the due payment of the annuity (such powers extending to give her the enjoyment in case she took possession without impeachment of waste, and such extension being beyond her power to give), and covenanted for further assurance. He afterwards acquired the fee.

Subsequently, in 1843, the settled hereditaments being in part subject to an antecedent mortgage created by the husband, and being considered by the wife an insufficient security for her annuity, the husband, by an indenture reciting these facts, assured, subject to the mortgage, the same and other property, the wife releasing her 500*l.* annuity, to trustees upon trust (in the events which happened) for sale, and for the investment of the whole if not more than sufficient, and if more than sufficient then of a sufficient part thereof, in a competent share of consols, to produce a clear yearly income of 500*l.*; or if the said moneys should not be equal to purchase a sufficient amount of such stock to produce such yearly income, then for the investment of the whole of such moneys in or upon some or one of the parliamentary stocks or public funds, or upon government or real securities, with power of variation of securities: and after the death of the husband for payment of the income to the wife during her life, in lieu and full satisfaction of her annuity under the marriage settlement, with remainder over.

The settled property was from time to time sold, and the net proceeds
 * 805 invested in consols; but the *investment failed to produce 500*l.* a year. The husband having sold his reversionary interest in part of the trust fund expectant on his wife's death and died: *Held*, in a suit instituted by the wife to have the trusts of the settlement and the deeds of 1843 carried into effect, —

- (1) That the object of the arrangement of 1843 was to give the wife a better means of insuring to her 500*l.* a year; but that she had no right to come upon the capital of the investment to make good that annual sum.
- (2) That the income of the investment in consols falling short of that annual sum, and the chief object of the trust being likely to be defeated by the insufficiency of the investment, the case was one for a change of investment into East India stock, under Stats. 22 & 23 Vict. c. 35, § 32, 23 & 24 Vict. c. 38, §§ 10, 11, 12, and the General Order of 1st February, 1861, notwithstanding the opposition of the purchasers of the reversion of part of the fund, but without prejudice to their rights as between

the husband's executors and themselves, and that the wife was entitled to the interest of that new investment as from the date of the order for it.

Quære: Whether she was entitled to any order in respect of arrears of the annuity accrued prior to the order. — *Mortimer v. Picton*, 166.

JOINT AND SEPARATE CREDITORS. See PARTNERSHIP, 2.

JOINT AND SEPARATE ESTATE. See FRAUDULENT DEED. INTEREST. JOINT-TENANTS.

Where an equitable charge is vested in two persons even as joint-tenants, the money cannot be paid to one without special authority from the other, so as to discharge the estate which forms the security.

Where the purchaser of property under an administration decree declined to complete his purchase, upon the ground of the non-concurrence on the occasion of a previous sale of one of two persons interested in the purchase-money: *Held*, that he must nevertheless bring the purchase-money into Court, the objection being one of conveyance and not of title. — *Matson v. Dennis*, 345.

JUDGMENT CREDITORS. See MORTGAGE, 3.

JURISDICTION.

1. The jurisdiction of the Court of Chancery is not ousted by a limited statutory jurisdiction conferred upon another Court, and is properly invoked where the purposes for which the limited jurisdiction * is * 806 conferred are at an end, or where the limited jurisdiction is not equal to the comprehension of the matter in dispute, or can only be exercised on terms destructive of the right claimed.

An insolvent debtor's estate had been fully administered in the Insolvent Debtors' Court, and a sum paid out of Court to him as surplus; but he had obtained no order to annul the insolvency or to revert his property in him: *Held*, that he was nevertheless entitled to sue in Chancery, in order to impeach the dealings of his assignees in insolvency with his property.

Rochfort v. Battersby (2 H. L. Cas. 388) and *Dyson v. Hornby* (7 De G., M. & G. 1) distinguished.

Circumstances under which a demurrer for multifariousness was overruled. — *Troup v. Ricardo*, 489.

2. Family estates stood limited to an eldest son for life, with remainder to his male issue in tail, with remainder to the second son for life, with remainder to his male issue in tail, with remainder to the eldest son's female issue in tail, with remainder to the second son's female issue in tail, with remainders over. The eldest son and his wife were divorced, at the husband's suit, by a decree of the Divorce Court; but no child of the marriage having been born during a cohabitation of six years, a female child was born of the wife after an interval of nearly eighteen months after cesser of cohabitation with her husband, a few weeks only after the decree *nisi* in the Divorce Court was pronounced, but before

- the decree absolute was pronounced. The child must have been begotten before the proceedings in the Divorce Court were instituted. The eldest son taking no steps to raise the question of the legitimacy of the child, and neither he nor the second son having any male issue, a small personal settlement was, after the decree absolute, made by the mother of the eldest son, with the privity of the second, for the express purpose of raising the question, the settlement giving successive interests to the children living at its date of the marriage between the eldest son and his then divorced wife and to the second son'. The latter then filed a bill to have the trusts of the settlement carried into execution, upon an allegation that the trustees declined to act except under the direction of the Court, charging the illegitimacy of the child, and claiming an immediate interest in the trust fund. The settlement was admittedly made for the purpose of settling the succession to the family estates. The child, by her counsel, disclaimed at the bar any right under the settlement: *Held* (affirming the decision of Vice-Chancellor Sir W. P. Wood, but on other grounds, and disapproving of *Gurney v. Gurney*, * 1 H. & M. 413), that a suit so circumstanced, being merely manufactured for the purpose of compelling the present trial in an indirect way of an important question affecting the title to large estates, namely, the *status* of legitimacy or illegitimacy of the infant, was not maintainable. — *Cooke v. Cooke*, 704.

* 807

See LEASE. PRINCIPAL AND AGENT. TRADE-MARK, 1, 2.

LACHES. See FRAUD, 4.

LANDLORD AND TENANT. See LEASE. WINDING-UP, 2.

LANDS CLAUSES ACT.

A public improvements Act referred back to and incorporated an earlier public improvements Act, which in its turn referred back to and incorporated a third. Each of the three Acts was passed after the Lands Clauses Act, and in none of them was there any provision for the payment of costs by the promoters, except in the case of moneys paid into Court in the cases of persons under disability: *Held*, that the provisions contained in the 80th section of the Lands Clauses Act as to the payment by the promoters of the costs of sales and conveyances must be considered as incorporated in the later Act, there being nothing in them to vary or except such provisions.

Observations on *In re Cherry's Settled Estates*, 4 De G., F. & J. 332.

In re Strachan's Estate, 9 Hare, 185, approved on the point of construction.

— *In re The Westminster Estate of the Parish of St. Sepulchre*, 232.

See WATERWORKS ACT.

LAPSE OF TIME. See FRAUD, 4.

LEASE.

A lease contained a covenant on the part of the lessees to "rebuild" a new house and premises on the site of the demised messuage, which they covenanted to pull down: *Held*, —

- (1) That the covenant did not involve any obligation to erect the new house in the same manner and in the same style and shape and with the same elevation as the old building.
- (2) That even if it did, the implication would have been rebutted in the case before the Court, inasmuch as the covenant stipulated that the new house and premises should be suitable for a purpose to which the old building was not applied.

The lease also contained an agreement that such of the windows and lights in the new house * and premises as occupied the site of * 808 ancient lights were to be considered as and should have all the rights of ancient lights. *Held*, that this was merely an agreement between the parties, amounting to an engagement by the lessees that, so far as they were concerned, and so far as they were owners of the adjoining property, the lights of the windows of the new house which should occupy the site of ancient lights should have the character of ancient lights; and that the extent of the covenant must be limited to such rights and such estate and interest as the appellants themselves might possess in the adjoining land.

The lease further contained a provision that certain entrances from the demised messuage and the yard in its rear into an adjoining court and gateway, and the right of carriage-way in respect of the messuage through such court should be preserved. *Held*, that the covenant must be construed with reference to the right of way and the user of the right of way which had existed as far back as could be traced by evidence in respect of the demised premises.

The assistance afforded by the Court of Chancery by way of mandatory and prohibitory injunction in aid of specific performance is a jurisdiction the exercise of which is eminently discretionary, and ought to be guided and measured by what substantial justice requires as between the parties.

Circumstances under which, by reason of a reasonable offer made by the defendants, and upon terms, the Court declined to exercise the jurisdiction.

Observations on the duty of the Court clearly to lay down, by the language of its injunction, what it permits and what it prohibits.

Liberty should not be given to a plaintiff, in a suit for a mandatory and prohibitory injunction in aid of specific performance of a building agreement, to apply to the Court in the event of the defendants erecting any wall or building which should prevent free access of light and air. Either the application for such liberty is premature, in which case the liberty ought not to be given; or if reason for the application afterwards arises, it must be the subject of independent proceedings. — *Low v. Innes*, 286.

See TRUSTEE, 2.

LEGACIES. See WILL, 1.

LEGITIMACY. See JURISDICTION, 2.

LICENSE. See MORTGAGE, 4.

LIGHT. See INJUNCTION, 4. LEASE.

* 809 * LIMITATIONS. See INSPECTORSHIP DEED.

LUNACY.

1. The word "property" in the Lunacy Regulation Act, 1862 (Stat. 25 & 26 Vict. c. 86), § 12, which empowers the Lord Chancellor to make a summary order for rendering the property of an alleged lunatic available for his maintenance, where such property does not exceed 1000*l.*, means beneficial property, or property clear of debt, and in a case where this did not satisfactorily appear to be the case, a reference was directed to the master in lunacy to inquire whether the fact was as stated, and also whether a proposed compromise affecting part of the property was proper to be carried into effect. — *In re Adams*, 182.
2. The Lunacy Regulation Acts of 1853 and 1862 contain no machinery by means of which a conveyance of the legal estate of a married woman of unsound mind in freehold property can be obtained; and in a case where this was sought an order was made simply directing a sale, and declaring all beneficial interest of the married woman bound by the order. — *In re Stables*, 257.
3. According to the established practice in lunacy, no person except the parties and those claiming under them may as of right inspect the proceedings; other persons claiming the right so to do must make a case for the purpose. Circumstances under which liberty was given to plaintiffs in a suit for the administration of the intestate lunatic's personal estate to do so. — *In re Wood, Banner v. England*, 134.

MAINTENANCE. See FRAUD, 1.

MARRIAGE. See DOMICILE, 2.

MARRIAGE SETTLEMENT. See INVESTMENT.

MARRIED WOMAN.

If a power be created to be executed by deed or instrument in writing, it may be well executed by will.

Under a power created either before or since the New Wills Act to appoint real estate by deed or will to be respectively signed, sealed, and delivered in the presence of and attested by three credible witnesses, a will executed in manner prescribed by that statute is a good execution of the power.

But where a power was created after the New Wills Act, to be executed by any instrument in writing, signed, sealed, and delivered in the presence of and attested by two credible witnesses: * *Held*, that a will duly executed in conformity with the statute, but not sealed, was not an instrument by which the power could be duly exercised.

* 810 A *feme covert*, where not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument *inter vivos* or will. — *Taylor v. Meads*, 597.

See LUNACY, 2. SETTLEMENT, 2.

MERCHANT SHIPPING ACT. See **SHIP.**

METROPOLITAN BUILDINGS. See **BUILDING ACTS.**

MISREPRESENTATION. See **FRAUD, 3.**

MORTGAGE.

1. A mortgagor induced his second mortgagee to release the mortgaged estate in consideration of the substitution of other securities; and then created a third mortgage on the estate so released. Afterwards he created a fourth mortgage on the estate. This mortgage was made with the concurrence of the third mortgagees, who joined to postpone their security, and who received part of the money raised on the security of the fourth mortgage in part discharge of the moneys due to them upon their own security. The mortgagor then died, and it was for the first time discovered that the securities substituted in the hands of the second mortgagee, and which were the consideration for the release executed by him, were forgeries. The fourth mortgagees sold the mortgaged estate, and after paying off the first mortgage retained the surplus in part discharge of the moneys due to them on their security. The net value of the estate after payment off of the first mortgage having been thus ascertained, the second mortgagee filed his bill against the third mortgagees seeking to recover the amount of that net value from them, they having received, as above mentioned, part of the moneys raised on the security of the fourth mortgage to an amount exceeding the net value of the estate: *Held*, that he was not entitled to such relief. — *Eyre v. Burmester*, 435.
2. Where the mortgagee of leasehold property which was unlet and could not be let, and was consequently unproductive, asked, in a suit for foreclosure or sale, for an immediate sale, under the Stat. 15 & 16 Vict. c. 86, § 48, and the Court below decreed accordingly, the Court of Appeal declined to interfere with what the Court below had done. — *Foster v. Harvey*, 59.
3. A husband's estates were limited to himself for life, with remainder to such uses as he and his wife * should jointly appoint for the * 811 purpose of raising money by way of mortgage or otherwise, and, subject thereto, to a termor to raise certain moneys due from the husband, with remainder to the wife for life, and with an ultimate remainder to the husband and wife in moieties. The husband and wife exercised the joint power, and thereby raised money for the use of the husband: *Held* (affirming the decision of the Master of the Rolls), that the case was not one in which the wife's estate had been pledged or charged for the husband's debt; and that, as there was no charge upon her estate, there could be no claim on her part for exoneration as against the husband's moiety of the estate, under the limitations of the settlement subsequent to the joint power.

Two of the settled estates were at the date of the settlement subject to two several mortgages, herein after called respectively mortgage A. and mortgage B. A third estate was subsequently charged under the joint power with a mortgage herein after called mortgage C. The husband

was tenant for life in possession of all three estates, and in 1840 a judgment was recovered against him, which was registered about the same time. In 1841 he became insolvent, and afterwards the interest on mortgage A. was allowed to fall into arrear. On the other hand, the persons claiming under mortgages B. and C., which did not affect the property comprised in mortgage A., were permitted to enter into the perception of the rents of the property in mortgage to them, and those rents exceeded the interest on mortgages B. and C., so that the persons claiming under these mortgages had a surplus of the rents in their possession: *Held*, that inasmuch as when the judgment was registered no surplus of the rents was in the possession of the mortgagees claiming under mortgages B. and C., the judgment creditor was subject to the same equity as would affect the tenant for life himself; viz., the obligation to keep down the arrears of the interest on mortgage A. before he could claim to stand in the place of the mortgagees claiming under mortgages B. and C. in respect of the principal moneys paid off out of the rents received by them.

Seemle, that the case would have been otherwise had there been surplus rents in the hands of the mortgagees in question at the date of the registration of the judgment.

Held, however, that the loss must be actually incurred before it could be the subject of set-off. — *Scholefield v. Lockwood*, 22.

4. An assignment of existing chattels by way of mortgage, accompanied by a power to the mortgagee to put a manager in possession, and a license to the mortgagee to enter and seize after * acquired chattels, does not
* 812 operate as an equitable assignment of such after acquired chattels, or create in the mortgagee any present equitable interest in them.

What amounts to notice on the part of a mortgagor of a sub-mortgage created by his mortgagee.

Where under a license to seize after acquired chattels seizures have been made, but the Court of Chancery intervenes before any conversion of the property seized has been made, *seemle*, that the rights of the various incumbrancers must be determined by a reference to what might have been done by any of them under the powers given by their respective securities. — *Reeve v. Whitmore*, *Martin v. Whitmore*, 1.

See INTEREST. SHIP. UNDERVALUE.

MORTMAIN ACT. See WILL, 8.

MULTIFARIOUSNESS. See JURISDICTION, 1.

MULTIPLICITY OF SUITS. See PATENT, 2.

NEUTRAL. See BLOCKADE.

NOMINEE. See CONTRIBUTORY, 9.

NOTICE. See MORTGAGE, 4. ORDER AND DISPOSITION. PARTNERSHIP, 4.
• TRUSTEE, 2.

NUISANCE.

Occurrences of nuisances, if temporary and occasional only, are not grounds

for the interference of the Court of Chancery by injunction, except in extreme cases. Therefore, where a railway company carried down to and deposited on a siding to their line manure which was occasionally not proper manure, and they occasionally allowed it to remain there longer than it ought to have remained: *Held*, in a suit by a neighbouring land-owner for an injunction to restrain the nuisance and for damages, —

- (1) That the Court would not interfere by way of injunction.
- (2) That the Court would not enter into the question of damages, the case being one which, in the judgment of the Court, could be more effectually disposed of at law than in equity, and Sir HUGH CAIRNS'S Act (21 & 22 Vict. c. 27) only giving the Court of Chancery jurisdiction to give damages in any case where a bill is properly filed in it, while Mr. Rolt's Act (25 & 26 Vict. c. 42) does not make it compulsory on the Court so to do. — *Swaine v. The Great Northern Railway Company*, 211.

* OFFER, See VENDOR AND PURCHASER.

* 813

ORDER. See APPEAL, 2.

ORDER AND DISPOSITION.

The object of the Joint-stock Companies Act, 1856, § 19, was that the company itself should not be bound by any trust, and that no notice should have any effect as against the company, but there is nothing in the Act which precludes an equitable mortgage of shares in a company, or renders an equitable mortgagee incapable of perfecting his title as against the mortgagor and his assignees in bankruptcy by giving notice of the mortgage to the company.

The managing director, who was also the sole secretary of a company registered under the above Act, joined with all his codirectors in making an equitable mortgage of their shares to a bank, as a security for an advance to the company. The bank gave no notice to the company. On the bankruptcy of the managing director: *Held*, that his shares were not in his order and disposition with the consent of the bank as the true owners thereof, but that the bank were entitled to them as mortgagees. — *Ex parte Stewart, In re Shelley*, 543.

PARTIES TO SUIT. See BUILDING SOCIETY, 2.

PARTNERS. See FRAUDULENT DEED. PARTNERSHIP.

PARTNERSHIP.

1. A power given to an individual of nominating himself or any other person a partner in a business does not constitute him a partner.

An agreement was entered into between A. and B., whereby in effect A. was to carry on a certain business in the name of "A. & Co." for the benefit of himself and any person whom B. might at any time within eight years nominate: B. was to make certain advances to A. for the

purpose of the business and become surety for him to a certain company: A. was to give B. promissory notes for his advances and any sums he might pay as surety, and to carry on the business in partnership with B.'s nominee for twenty-one years on certain specified terms: the profits of the business were to be for the first eight years applied in paying A. 100*l.* a year, and then in paying B. his advances with interest; and the residue was to be divided between A. and B.'s nominee in certain specified proportions, and losses were to be borne in the same proportions. The agreement gave B. a right to see the accounts relating to the business, and contained other special clauses under which B. might at any time within the eight years have nominated himself as a partner. Before the eight years had elapsed, * and before any nomination had been made by B., A. became bankrupt, being indebted to B. for advances. There being no person who claimed to be a joint creditor of A. and B.: *Held*, that B.'s executor was entitled to prove against A.'s estate for the advances, the agreement not having constituted A. and B. partners as between themselves. — *Ex parte Davis, In re Harris*, 523.

* 814

2. The Court refused to relax the rule in Bankruptcy that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another until all the joint debts are paid, although, in the circumstances of the case, and having regard to the amounts of the estates, the result of relaxing the rule would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would arise from the estate sought to be proved against if the rule were observed and the proof excluded.

The rule in question enures for the benefit of the separate creditors as well as of the joint creditors. — *Ex parte Collinge, In re Holdsworth*, 533.

3. A firm of two became bankrupt, one partner being indebted to the other. The debt arose from a contract apart from the copartnership, and was in existence at the time of the adjudication. It was admitted that there could not be any surplus of the debtor partner's estate for the joint creditors, whether the debt was allowed to be proved against that estate by the creditor partner or not: *Held*, to be a proper case for relaxing the general rule, and that the creditor partner might prove against the debtor partner's estate; and it was so ordered, with a declaration that the proof must be subject to be expunged, and the dividend refunded, if any surplus of the debtor partner's estate should arise for the benefit of the joint creditors. — *Ex parte Topping, In re Levey*, 551.

4. Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and indorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts and his authority, unless they have notice or reason to believe that the thing done in the

partnership name is done for the private purposes or on the separate account of the partner doing it. In that case authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act he must depend upon the right of the partner or on circumstances * sufficient to repel the presumption of * 815 fraud.

The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so.

Where the bankers of an individual member of a firm, knowing that the firm banked elsewhere, received from and discounted for their customer bills of exchange, purporting to be drawn and indorsed by the firm and also indorsed by the customer, the signatures of the firm as drawers and indorsers and of the customer as indorser, as well as the whole of the bills, with the exception of the signatures of the acceptors, being in the customer's handwriting: *Held*, that the transaction showed on its face a conversion by the customer of partnership property to his own purposes; that the bankers had been guilty of great negligence in abstaining from inquiry; and that they could only claim as against the customer's copartners so far as the customer himself might have claimed compensation from them in respect of moneys paid by him out of his private account for partnership purposes. — *Ex parte The Darlington and District Joint-stock Banking Company, In re Riches and Marshall's Trust-deed*, 581.

See FRAUDULENT DEED. INTEREST. TRADE-MARK, 2, 3.

PAST MEMBER. See CONTRIBUTORY, 8.

PATENT.

1. The provisional and complete specifications of a patent ought not so to differ as that the nature of the invention as described in the one shall be materially different from the nature of the invention as described in the other. *Semble*.

A patent for a new machine may be good though the specification contains nothing but clear drawings of the machine and a description of them. *Semble*.

A patent for "the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle and shuttle," would be void from the unlimited extent of the words used, unless they could be cut down by the context so as to apply to a specified combination and arrangement of specified parts of machinery.

Where by the operation of a disclaimer a combination of machinery described in an amended specification is different from the combination of machinery described * in the original specification, and for which * 816

the patent was granted: *Quære*, whether the patent is void or the disclaimer void.

Where the amount by which the disclaimer exceeds the statutory requirements as to its nature can be easily distinguished, the disclaimer is inoperative for such excess. *Semble*.

Where the combination of machinery in an amended specification was different from the combination in the original specification, and no specification remained of the invention for which the patent was granted; and where, the combination being claimed as the invention, it was only so far ascertained by the specification that the latter referred to certain drawings and their description, which did but describe an entire machine and the composition and working of its several constituent parts, without in any manner indicating where the improvement lay or in what it consisted: *Held*, that the patent was void at law.

In a patent for an improved arrangement or new combination of machinery, the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the whole machine: it must assign the *differentia* of the new combination.

Observations on *Harmer v. Playne*, 11 East, 101; *Davies's Patent Cases*, 311. — *Foxwell v. Bostock and others*, 298.

2. One hundred and thirty-four suits were instituted against as many defendants by a patentee for infringement of his patent, and interrogatories were served. Seventy-seven defendants, combining together amongst themselves so as to make four bodies in all, moved, before putting in any answers, that the plaintiff might be directed to proceed with one suit only until it should have been determined or until the validity of the patent should have been finally decided, or until further order; and that the proceedings in the other suits might in the mean time be stayed, or that the time for answering and producing documents might be enlarged, the moving defendants undertaking to be bound by the result of the selected suit so far as the question of the validity of the patent was concerned. The Court, upon terms, and the plaintiff not opposing, made an order with a view of trying before itself the question of validity in the first instance before entering upon the question of infringement. — *Foxwell v. Webster*, 77.

PAYMENT. See JOINT-TENANTS.

PENALTY. See DISCOVERY, 1.

PER CAPITA. See WILL, 4.

*817 *PER STIRPES. See WILL, 4.

PLANT. See INJUNCTION, 3.

PLEADING. See FRAUD, 3. SPECIFIC PERFORMANCE, 1.

POLICY. See FRAUD, 3. UNDERVALUE.

POWER. See MARRIED WOMAN.

POWER OF APPOINTMENT. See MORTGAGE, 3.

PRACTICE. See AFFIDAVIT, SWEARING OF. APPEAL, 1, 5. INJUNCTION, 2, 5. LUNACY, 3. MORTGAGE, 2. PATENT, 2. STOP ORDER.

PRESCRIPTION.

The first section of the Prescription Act (2 & 3 Will. 4, c. 71), which relates to profits *à prendre*, applies only to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to the case of a right claimed by a copyholder in his own tenement according to the custom of the manor.

The meaning of the 6th section of the Act is, that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years.

But where there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant.

Customary rights of copyhold tenants differ from prescriptive rights; the former are usages which apply to a number of persons in a certain district or locality, but prescriptive rights are claimed by one or more person or persons as existing in themselves or their ancestors, or as attached to a particular estate.

The law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be rightly drawn. It is the province of a jury to draw these conclusions of fact.

Circumstances under which the Court sitting as a jury found the existence of a custom in a copyhold manor authorizing the tenants thereof to dig for and get sand, sandstone, gravel, and clay from their respective tenements, and to cart and carry away the same on * to * 818 other lands, and to use or sell the same either on or off the manor without license from the lord.

There must be one rule applicable to ecclesiastical persons as well as to lay when the question is whether rights belonging to them have or have not been lost by negligence. — *Hammer v. Chance*, 626.

PRINCIPAL AND AGENT.

A land-owner may maintain a suit in equity against the agent and manager of his estates, if the object of such suit is either to obtain an account (and in that case allegations of fraud or special circumstances are unnecessary), or to obtain the delivery up by the agent of documents in his hands belonging to the land-owner.

Observations on *Phillips v. Phillips*, 9 Hare, 471. — *Makepeace v. Rogers*, 649.

PRINCIPAL AND SURETY. See MORTGAGE, 3.

PRIORITIES. See MORTGAGE, 1.

PROCLAMATION. See BLOCKADE.

PRODUCTION. See DISCOVERY, 2.

PROMISSORY NOTE. See GIFT.

PROOF. See INTEREST. PARTNERSHIP.

"PROPERTY." See LUNACY, 1.

PROVIDENT SOCIETY. See CONTRIBUTORY, 8.

PUBLIC COMPANY. See BUILDING SOCIETY, 1. COMPANY. CONTRIBUTORY. DEBENTURE. ORDER AND DISPOSITION. SET-OFF. WINDING-UP.

PUBLIC POLICY. See INFANT, 1.

PURCHASER. See UNDERVALUE.

REFUNDING DIVIDEND. See INTEREST.

REGISTER. See CONTRIBUTORY, 1.

REHEARING. See BUILDING SOCIETY, 1.

RELIGION. See INFANT, 2.

REPUTED OWNERSHIP. See ORDER AND DISPOSITION.

* 819 *RESTRICTIVE COVENANTS. See BUILDING SOCIETY, 2.

REVERSIONARY INTEREST. See UNDERVALUE.

RUNNING BLOCKADE. See BLOCKADE.

SALE. See FRAUD, 2. JOINT-TENANTS. MORTGAGE, 2. SETTLEMENT, 2.
SPECIFIC PERFORMANCE.

SEPARATE ESTATE. See MARRIED WOMAN.

SEPARATE USE. See SETTLEMENT, 2.

SEQUESTRATION. See WINDING-UP, 2.

SET-OFF.

A surety for a debt of a joint-stock company paid the debt after the date of an order for winding up the company, under the Joint-stock Companies Acts, 1856 and 1857. Among the securities for the debt in the hands of the creditor was a promissory note of the company: *Held*, that the surety was entitled to set off against a debt due from him to the company an equal amount of the money due from the company on the promissory note.

A contributory of a joint-stock company (which was being wound up under the Acts of 1856 and 1857), in respect of shares purchased in his name by another: *Held*, not entitled to set off against demand of the company the amount due from the company upon its promissory notes made in favour of the person who was the real purchaser of the shares, and who had indorsed and deposited the notes with the nominal purchaser's solicitors as an indemnity in respect of his liability on the shares.—*In re The Moseley Green Coal and Coke Company, Limited. Barrett's Case* (No. 2), 756.

See MORTGAGE, 3.

SETTING ASIDE SALE. See UNDERVALUE.

SETTLED ESTATES ACT.

Where, after a petition has been presented under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120) and advertised, amendments in it become necessary, it is not of course upon the amended petition to begin *de novo* with respect to the advertisements. The course to be adopted will depend upon the discretion of the Court, which will be governed by the particular circumstances of each case.

If the amendment involves the statement of such new facts or the introduction of such new parties * as to give to the petition a new * 820 character, new advertisements would be directed. *Semble*.

Circumstances under which advertisements of an amended petition under the Act were held not to be necessary. — *In re Bunbury's Settled Estates*, 573.

SETTLEMENT.

1. In construing a prenuptial settlement, it must be considered that the intention of the parties to it was to provide for the children of the marriage at the time when those children would require provision to be made for them, and a construction which would exclude a son who attained twenty-one and afterwards died in the lifetime of his surviving parent, cannot be adopted in the absence of words absolutely compulsory.

The language of such a settlement may be controlled by its general intention. — *Currie v. Larkins*, 245.

2. On the marriage of a lady, who was entitled under her father's will to an interest in his residuary estate and two sums of cash in reversion expectant on her mother's death or marriage, and to no other property, a settlement was executed whereby the intended husband and wife covenanted that if at any time during the life of the lady any real or personal estate should be given or devised, descend or devolve, be bequeathed or come to her or her husband in her right, it should be settled. The property was to be held by the trustee upon trust to pay the income to the wife or her appointees, to the intent that the same might be and remain a separate personal and inalienable provision for the wife during the coverture: and upon further trust to pay, assign, or otherwise dispose of the same from time to time to the wife's appointees by deed or will: *Held*, —

- (1) That the reversionary interests of the wife were bound by the covenant.
- (2) That the wife could not during the coverture affect against herself by way of anticipation any portion of the income arising from them.

The reversionary interests in question, whilst still reversionary, were assigned by the wife by deed duly acknowledged to the trustee of the settlement by way of sale, he having been removed from his office by deed of even date; the consideration was in fact in part made up of advances made by him to the husband. The wife received no explanation of her rights when she executed the assignment: *Held*, that the sale must be set aside.

To what extent the trustee was entitled to a charge on the wife's reversion expectant on the coverture in respect of moneys advanced by him to her or to her husband with her consent or by her direction.

* *Quære*. — *Spring v. Pride*, 395.

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3. On the marriage of a widow who had an illegitimate daughter, funds belonging to her were settled on trust for her for life for her separate use, without power of anticipation, with remainder to her appointees by deed or will, and in default of appointment for her absolutely, if she should survive her intended husband; but if she died in

his lifetime the fund was to be held in trust for the persons who would have been entitled under the Statutes for the Distribution of the Effects of Intestates if she had died intestate and without having been married. And it was declared that her illegitimate daughter should for the purposes of that trust be deemed to be her lawful child. The settlement contained no express provisions for children or issue. The marriage having taken place, and the wife having died in the husband's lifetime, without lawful issue, and without having made any appointment under the power: *Held*, reversing the decision of the Master of the Rolls, that not the wife's next of kin, but her illegitimate daughter, was entitled to the trust funds. — *Wilson v. Atkinson*, 455.

See DISCOVERY, 1. DOMICILE, 2. INVESTMENT. MORTGAGE, 3.

SHAREHOLDERS. See CONTRIBUTORY, 4.

SHARES. See ORDER AND DISPOSITION.

SHERIFF. See WINDING-UP, 2.

SHIP.

Under the Merchant Shipping Act, 1854, so long as the mortgagee of a ship does not take possession, the mortgagor, as the registered owner, subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not impair the mortgagee's security.

Where, therefore, a mortgagor in possession had made a charter-party which was not shown to be in any way prejudicial to the sufficiency of the security: *Held*, that the mortgagees were bound by it, and an injunction was granted, at the suit of the charterers, to restrain the mortgagees from dealing with the ship in any manner inconsistent with, or which might interfere with or prevent the execution of the charter-party. — *Collins v. Lamport*, 500.

See BLOCKADE.

SIGNATURE OF COUNSEL. See APPEAL, 1. BUILDING SOCIETY, 1.

SPECIFICATION. See PATENT, 1.

* 822 * SPECIFIC PERFORMANCE.

1. In a suit for specific performance of an agreement for sale and purchase of land, if the defendant means to set up the Statute of Frauds as a defence, he must do so before the hearing, at which time the defence is not open to him, although he has denied the existence of the agreement altogether. *Per Lord Justice KNIGHT BRUCE*.

Observations on *Ridgway v. Wharton*, 3 De G., M. & G. 677. — *Heys v. Astley*, 34.

2. Properties held partly by an absolute owner and partly by several sets of trustees under several trusts and for different persons were, by the vendors as a single body, agreed to be sold together in one lot for one undivided sum, — which the absolute owner, and the trustees and their several sets of *cestuis que trustent* afterwards apportioned by agreement amongst themselves, but not, as it appeared, on any sufficient data, — and with special conditions limiting the title, without, however, properly defining the portions of the properties affected by the limitations. The

purchaser refused to complete the purchase, and the vendors filed a bill for specific performance of the contract: *Held*, reversing the decree of the Master of the Rolls, that the case was too doubtful to entitle them to the relief.

Observations as to the sale of trust properties conjointly with property not subject to the trusts, and the manner in which such sales ought to be made. — *Rede v. Oakes*, 505.

See INJUNCTION, 1. LEASE. VENDOR AND PURCHASER.

STATUTE. See ACCUMULATION. BUILDING ACTS. CHARITY. LANDS CLAUSES ACT. LUNACY, 1, 2. WATERWORKS ACT.

STATUTE OF FRAUDS. See SPECIFIC PERFORMANCE, 1.

STATUTE OF LIMITATIONS. See INSPECTORSHIP DEED.

STOP ORDER.

A stop order on a fund in Court, however general in its terms, is nevertheless confined in its operation to the specific portion of the fund in respect of a dealing with which the order is made.

A purchaser of a reversionary share of a fund in Court obtained a stop order extending in terms to the whole fund, and on a subsequent purchase of a further reversionary share in the fund obtained no further stop order. The vendor of this latter share subsequently created a charge upon it, the holders of which, after the reversionary share had fallen into possession, obtained a stop order upon the interest of the vendor in the * fund. *Held*, that the holders of the charge were entitled * 828 to priority over the purchasers in respect of the vendor's share in the fund.

Per the Lord Justice TURNER. — Stop orders ought to be drawn up, as is the practice, so as to express in distinct terms upon the face of them that they affect only the share and interest of the party assigning. — *Macleod v. Buchanan*, 265.

SUB-MORTGAGE. See MORTGAGE, 4.

SUBSTITUTED POLICY. See UNDERVALUE.

SUBSTITUTIONAL GIFT. See WILL, 2. SURETY. MORTGAGE, 3. SET-OFF.

THELLUSSON ACT. See ACCUMULATION.

TRADE-MARK.

1. The jurisdiction of the Court of Chancery in the protection given to trade-marks rests upon property, and the Court interferes by injunction, because that is the only mode by which property of this description can be effectually protected.

Property in a trade-mark is the right to an exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity.

Consideration of the question, how far the right to use a trade-mark admits of being sold or transferred.

Where the owner of a trade-mark applies for an injunction to restrain the

defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark or in the business connected with it be himself guilty of any false or misleading representation.

Consideration of what constitutes a material false representation.

It is not a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood in his trade-mark, because it may be so gross and palpable as that no one is likely to be deceived by it. — *The Leather Cloth Company, Limited v. The American Leather Cloth Company, Limited*, 137.

2. The jurisdiction of the Court of Chancery in the protection of trade-marks rests upon property, and fraud in the defendant is not necessary for the exercise of that jurisdiction.

Observations on *dicta* to the contrary, and as to why imposition on the public is necessary for the plaintiff's title.

The name of the first maker of an article may in time become a mere
* 824 sign of the quality of the * article, and cease to be a representation that the article is the manufacture of any particular person.

Observations on the distinction between a name and a trade-mark, and the respective legal rights flowing from them.

Where, in the judgment of the Court, certain initial letters, surmounted by a crown, had, although originally representing the names of certain partners, become and were a trade-mark; that is, a brand which had reputation and currency in the market as a well-known sign of quality: *Held*, that as such the trade-mark was a valuable property of a partnership constituted by successors to the original partners, but not having the same initials, as an addition to their works, and might be properly sold with the works, and therefore properly included as a distinct subject of value in the valuation to the surviving partner.

Good-will, *held*, to be a distinct subject of value, and as such to be included in any sale or valuation to the surviving partner, but with the qualification that it was not to be valued, on the principle that the surviving partner, if he were not the purchaser, would be restrained from setting up the same description of business. — *Hall v. Barrows*, 150.

3. A corporate trade-mark, granted by the Cutlers' Company at Sheffield to a person not free of the company, is, so far as the special Acts governing the company are concerned, assignable.

Circumstances under which it was held that such a corporate trade-mark, and also an ordinary trade-mark, were upon principles of general law assignable and had in fact been assigned.

Per the Lord Justice TURNER: The question how far by the general law a trade-mark is assignable depends greatly upon the nature of the mark and the mode in which it has been used.

Observations on the difference in effect of a creditors' deed and a bankruptcy. Upon the formation of a partnership with a person entitled to the benefit of a trade-mark, the mark, in the absence of express provisions in relation to it, becomes an asset of the partnership. — *Bury v. Bedford*, 352.

4. An element in the right to property in a trade-mark is the fact of the article to which the stamp or mark is affixed being in the market as a vendible article with the stamp or mark at the time when it is imitated. The essential ingredients for constituting an infringement of a right to a trade-mark are — (1) that the mark has been applied by the plaintiffs properly, i.e., that they have not copied any other person's mark, and that the mark does not involve any false representation; (2) that the article so marked is actually a vendible article in the market; (3) that the defendants, * knowing that to be so, have imitated * 825 the mark for the purpose of passing in the market other articles of a similar description. *Semble*.

Although where a word is chosen as a trade-mark which is in fact a geographical designation of a whole tract of country, where the raw material is grown whence a manufactured article is produced, there cannot be property in the word for all purposes, yet property in the word, as applied by way of stamp upon a particular vendible article, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality or of some other circumstance which renders the article so stamped acceptable to the public. — *McAndrew v. Bassett*, 380.

TRIAL BY JURY. See APPEAL, 5.

TRUST. See FRAUD, 4.

TRUSTEE.

1. Circumstances under which the Court making to executors and trustees an allowance for trouble and loss of time in managing the testator's leasehold property and carrying on his business, fixed the amount itself, without directing an inquiry. — *Forster v. Ridley*, 452.
2. Where lands are devised to trustees in fee upon trusts or with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will.

A trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate may be performed by the heir. But whether a trust may be performed or a trust power exercised by the heir-at-law, which is obligatory on the trustees of the will, depends on the question whether in the exercise any thing has to be supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power.

A power to lease may be a trust power in the sense of its being the duty of the trustee to avail himself of it under proper circumstances; but it is to be exercised by a person selected for the purpose, and not by the individual on whom by reason of intestacy the law casts the estate.

Acceptance by an adult beneficiary after attaining majority of rent accruing under an invalid lease is not a confirmation of the lease or a bar to relief by having the lease set aside.

on the intended vendor, as being beyond the authority vested by her in her solicitor.

An agreement is the result of the mutual assent of two parties to certain terms: and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract.

But where to a proposal or offer an assent was given subject to a provision as to a contract: *Held*, that the stipulation as to the contract was a term of the assent, and that there was no agreement independent of that stipulation. — *Chinnock v. The Marchioness of Ely*, 638.

See FRAUD, 2. JOINT-TENANTS. SPECIFIC PERFORMANCE. TRUSTEE, 2. UNDERVALUE.

VESTING ORDER. See TRUSTEE ACT.

WARD. See INFANT.

WATERWORKS ACT.

It is incumbent upon a company claiming a statutory compulsory power of taking land to prove clearly and distinctly from the Act of Parliament the existence of the power; and if there is any * doubt with regard to its extent, the land-owner shall have the benefit of that doubt.

The effect of the incorporation of a general Act of Parliament into the special Act of any such company is, that the general Act must be looked at with reference to the powers conferred upon companies of dealing with the land when acquired; but it is to the special Act that regard must be had for the purpose of ascertaining the contract between the land-owner and the company and the power which the company has of taking the land.

The meaning of the 12th section of the Waterworks Clauses Act, 1847, is, that subject to a company having authority to take lands and construct works, then, if the company have power, and space, and room enough in the land which they are authorized to take to afford them an area for additional works, they may be empowered to make the collateral and auxiliary works referred to in the section.

The whole tenor of the Act in question is, that it refers by anticipation to the special Act for the purpose of ascertaining therein what is the land to be taken and what are the works to be done on the land. Referring to that, it then invests the company with certain general powers which may be useful or necessary for the purpose of carrying into effect upon the land authorized to be taken the work which by the special Act is definitively described.

A waterworks company incorporated by a special Act, with which were incorporated the Lands Clauses Consolidation Act, 1845, and the Water-

works Clauses Act, 1847, deposited plans and sections and gave notices to a land-owner indicating an intention on the part of the company merely to lay through the land-owner's property a tunnelled aqueduct at a depth of forty-five feet below the surface. The company afterwards claiming to hold the land permanently for other purposes than the purpose so indicated: *Held*, that they were not entitled to do so; and that, save for the purposes of construction, they were not entitled to take and hold permanently any other portion of the land than so much as was necessary for the construction of and would be contained within such tunnel in conformity with the plan deposited as they should deem necessary for the purposes of their works authorized by Act of Parliament. — *Simpson v. The South Staffordshire Waterworks Company*, 679.

WILL.

1. A testator, after bequeathing certain legacies, devised his freehold estate, called R., to his brother in tail male, but subject to and charged with the payment of two annuities; and he directed that * the * 830 residue of his estates therein after devised should be considered and made the primary fund for the payment of his debts and the several legacies given by his will, and that his R. estate "herein before devised subject as aforesaid," to his brother in tail male, should not be subject or liable to the payment of the said legacies, unless the residue of his estates therein after specifically bequeathed for those purposes should prove of insufficient value. That event having happened, *held*, that the subject-matter which was charged with the legacies was only the R. estate burdened with the annuities, which consequently had priority thereon over the legacies.

The residuary estate was expressly charged with the legacies given by the testator's will and every legacy or legacies to be given by any codicil or codicils thereto, unless a contrary direction should be expressed in such codicil or codicils. By a codicil the testator gave an annuity and directed the purchase of a house, each as a charge on his "estates in Ireland," out of which country he had no real estate. *Held*, that this last annuity and the purchase-money of the house were, in like manner as the legacies given by the will, charged on the R. estate, but subject to the prior annuities. — *The Earl of Portarlington v. Damer*, 161.

2. A testator by his will gave his daughter a legacy of 700*l.* Two subsequent codicils contained no reference to the legacy. The daughter then became engaged to be married, and the testator thereupon gave her 100*l.*, which she used for her outfit. After the marriage the testator gave the husband of the daughter 400*l.* On neither occasion was any reference made to the will or the testator's intended testamentary dispositions. Afterwards the testator executed a further codicil to his will, which contained no reference to the 700*l.* legacy, and expressly confirmed the will. *Held*, —

- (1) That the 100*l.* was a gift and not an advancement, nor a substitution total or partial for the 700*l.* legacy.

(2) That the same was the case as to the 400*l*. *Per* the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls; but on other grounds the Lord Justice TURNER doubting.

(3) That the existence of the last codicil to the will, though not decisive of the question, was a fact which could not be left out of consideration. *Per* the Lord Justice KNIGHT BRUCE. — *Ravenscroft v. Jones*, 224.

3. In the administration of charitable bequests it is the duty of the Court to ascertain from the words of the will, by the ordinary rules of construction, the true meaning and intention of the testator, both as * to the bequest itself and the mode of carrying it into effect, without in the first instance advertent to the existence of the Statute of Mortmain.

When the intention of the testator has been ascertained, inquiry is to be made whether the whole or any part of that intention is contrary to the provisions of the statute. But no secondary interpretation ought to be adopted, nor ought the Court to resort to any different mode of administration from that indicated by the testator, even though it may be reasonable in itself, for the purpose of escaping from the operation of the statute.

The Attorney-General v. Williams (2 Cox, 387) followed and approved.

A gift to the Society for the Prevention of Cruelty to Animals, to be applied as the committee should "think best, towards the establishment in the neighbourhood of London or Westminster of slaughter-houses away from the densely populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered:" *Held* void, as being within the Statute of Mortmain, 9 Geo. 2, c. 36. — *Tatham v. Drummond*, 484.

4. A testator directed his property to be divided and paid "to the persons being such descendants as next herein after mentioned in equal shares among and to the lawful descendants living at the time of my death of such of the brothers and sisters of my late grandfather as have died leaving lawful descendants; such descendants respectively to be entitled to share the same moneys in a course of distribution *per stirpes* and not *per capita*:" *Held* (reversing the decision of the Master of the Rolls), that the words "*per stirpes*," and not "*per capita*," were applicable to the descendants, who were to be classified *secundum stirpes*, or according to their families, and that the property was to be divided into as many shares as there were *stirpes* or families, each *stirps* or family taking an equal share. — *Robinson v. Shepherd*, 129.

5. A testator who had no issue, after prefacing his will with expressions showing his anxiety that his ancestral estate should remain a principal family residence, and his apprehension that a considerable period might elapse before any adult person would become entitled to the full benefit of his estates under the disposition made by him, devised his real estates to the use of trustees for a term of 500 years, and after the determination of the same and in the mean time subject thereto and to the trusts thereof, to the use of trustees during the lives of his two sisters and the life of the longer liver of them, to preserve contingent remain-

ders, and to pay * the rents and profits to the trustees of the * 832 term, to be applied as therein after mentioned, and such estate to determine in the event of total failure or impossibility of issue of the testator's sisters to take under the limitations therein after contained; with remainder to the use of the first and other sons of his elder sister who should be born within fifteen years after the date of the will successively in tail male; with remainder to the use of the first and other sons of his younger sister born within eighteen years after the aforesaid date; with successive remainders in favour of the first and other daughters of the sisters born within the aforesaid respective periods in tail male and tail general; with remainder to uses in favour of younger sons of Lord De L. which failed; with remainder to the use of his daughters then born or thereafter to be born in the testator's lifetime (according to seniority of age) for life, with a power of cutting timber under the control of the trustees of the 500 years' term; with remainder to the use of trustees to preserve during life tenancies; with remainder to the use of the first and other sons of each such daughter successively in tail male; with remainders over. The testator then provided for the assumption of his family name and arms by persons and the husbands of persons entitled under his will, and for the shifting of the limitations contained in the will in case of any of them becoming entitled in possession to the mansion and estate belonging to the De L. family.

The trusts of the 500 years' term were, that the trustees should immediately after the testator's death enter upon his ancestral mansion and estate, and thenceforth during the lives of his uncle and his sisters and the survivors and survivor of them, and during the minority of any person who, at the decease of the survivor of his uncle and sisters, might under the limitations of the will be entitled beneficially to the possession of the testator's estates and under twenty-one, receive the rents, keep up the mansion-house and gardens and appurtenances, and manage the estates and direct repairs and improvements; grant leases, sell timber, keep down interest on incumbrances, appoint agents, cut timber to provide for the objects of the will; and out of the residue to pay certain annuities to the testator's uncle and sisters. The testator then provided, that these annuities were not to entitle his uncle and sisters to reside at the mansion-house unless authorized by the trustees so to do, or to interfere in the management of his estates; and he declared that, during minorities, the trustees of the term, but without prejudice to the annuities under his will and other charges, might pay and * apply during the lives of his sisters a competent part of the * 833 surplus, interest, and income of the said estates to or for the maintenance and education, or otherwise for the benefit of the minors, the trustees accumulating the surplus and investing the same as they should think best; and he directed that such accumulations should be applied in satisfaction of any debts affecting his estates or of legacies, and subject thereto should be subject to the trusts declared of moneys to arise under the power of sale after contained.

He then provided, that the trusts thereby declared for the management of the estates should, after the death of his uncle and sisters, be suspended during the life of any adult person who should become entitled thereto for any estate for life in possession by virtue of the will, and should cease when the uncle and sisters should be dead, and an adult tenant in tail by purchase under the will should become absolutely entitled.

There were powers for the trustees of the term to lease, to open and work mines and grant mining leases, and to sell and exchange with the usual ancillary clauses, under which the moneys to arise from sales and exchanges were to be applied in discharging incumbrances on the settled estates, and subject thereto in the purchase of other hereditaments to be settled to the same uses.

The testator then devised his copyhold and leasehold estates, and certain articles of personal estate, to the trustees of the term, upon trusts to correspond with those declared of the settled estates, and so as to go along with the latter; and bequeathed his residuary personal estate to the same trustees upon trust for conversion into money, to be held on the same trusts as the moneys to arise from sales of the settled estates.

The uncle having died, the elder sister being also dead unmarried, and the younger sister, who had become the testator's sole heiress-at-law, being still living, married, and having had one only child, which had died before the date of the testator's will, and the eighteen years from the date of the testator's will having expired: *Held*, —

(1) That the direction given to the trustees to manage the estates did not involve any suspension of the enjoyment of the estates themselves or interfere with the right of the devisees, save so far as that they might not be entitled to claim the possession of the estates, and that there was no intestacy, no part of the rents and profits of the estates being undisposed of.

(2) That immediately subject to the trusts of the 500 years' term the plaintiff, who was the eldest daughter of Lord De L., as the person entitled to the first vested estate for life, became, as from the testator's death, entitled to the * surplus rents of the whole of the estates not required for the exigencies declared of the term.

(3) That the trust for the accumulation of the surplus rents was not absolute, but limited to the period of time during which there should be, and came into existence only in the event of there being, a minority before the death of the testator's sisters.

(4) That the plaintiff was entitled to the immediate possession of the mansion-house, and to the receipt of the surplus rents, she undertaking to perform all those things which the trustees had a right to require under their powers of management, and she and her husband complying with the directions of the will as to the assumption of the testator's name and arms. — *Sidney v. Wilmer*, 84.

See MARRIED WOMAN. TRUSTEE ACT.

WINDING-UP.

1. A creditor of a company not registered under the Companies Act, 1862,

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obtained judgment against them, issued execution upon it, and the sheriff went into possession and was about to sell. Some days afterwards a petition to wind up the company under the Companies Act, 1862, was presented, and before any winding-up order was made upon it, an *ex parte* injunction was obtained by the petitioners under the 201st section of the Act, restraining the creditor from further proceedings at law and the sheriff from selling: *Held* (the Lord Justice KNIGHT BRUCE assuming — but doubting as to each point — that where an action has been concluded by judgment and execution levied, a sale under the execution is a “proceeding in any action” within the 201st section of the Act, and, secondly, that, if it is, an *ex parte* injunction could be granted under that section, and the Lord Justice TURNER giving no opinion on the first point), that the Court, having a discretion under the 201st section, ought not to have exercised it in favour of granting the injunction in a case circumstanced as above stated.

Remarks on the principles by which the Court should be guided in exercising the discretion vested in it by the 201st section of the Companies Act, 1862. *Per* the Lord Justice TURNER. — *In re The Great Ship Company, Limited, Parry's Case*, 63.

2. A lessor distrained for rent upon goods which were upon the demised lands, and which belonged to a joint-stock company. The distress was put in after the presentation of a winding-up petition against the company, upon which an order was made subsequently to the putting in of the distress. * The demised lands were held by trustees for * 835 the company: *Held*, that the distress might proceed.

Per the Lord Justice TURNER: The Companies Act, 1862, § 163, only avoids attachments, sequestrations, distresses, or executions when leave to put them in force has not been given under sect. 87. — *In re The Exhall Coal Mining Company, Limited*, 377.

See APPEAL, 2. BUILDING SOCIETY. CONTRIBUTORY. DEBENTURE.
SET-OFF.

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END OF THE FOURTH VOLUME.



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